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115-1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~191~~ 670

PHILADELPHIA BAR ASSOCIATION

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

A. F. McALLISTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED SEPTEMBER 29, 1883.

The claim to a removal is rested by the defendant entirely on the fact that it is incorporated under the laws of the United States.

This point has been sufficiently argued in our [illegible] in above cases.

The judgment should be affirmed.

W. HALLETT PHILLIPS,
For Defendant in Error.

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

FILED SEPTEMBER 29, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 994.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

A. F. McALLISTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

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a No. 1110. 4th Assig't.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant,
vs.
A. F. MCALLISTER, Appellee. } No. 6833.

Transcript from Harrison County, Texas.

Applied for by Turner & Stuart, on the 2d day of August, 1881.
Delivered to Turner & Stuart on the 5th day of October, 1881.
A. S. FIELDS, *Cl'k.*

Filed Nov. 14th, 1881. S. D. REAVES, *Clerk.*

1 *Caption.*

THE STATE OF TEXAS, *County of Harrison:*

At a term of the district court, begun and holden at the city of Marshall, within and for the county of Harrison, before the Hon. A. J. Booty, and ending on the second day of July, A. D. 1881, the following case came on for trial, to wit:

Original Petition. Filed 16th April, 1879.

THE STATE OF TEXAS, *County of Harrison:*

In District Court, Spring Term, A. D. 1879.

A. F. MCALISTER, Plaintiff,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY, Def't. } No. 6833.

To the Honorable A. J. Booty, judge of the second judicial district:

The petition of Alexander F. McAllister, who resides in said Harrison county, State of Texas, complaining of the Texas and Pacific Railway Company, a body politic and corporate, created
2 under and by various acts of the Legislature of the State of Texas, having its main office and domicile in the city of Marshall, in said county of Harrison and State of Texas, respectfully shows:

That heretofore, to wit, on the 10th day of February, A. D. 1879, the said defendant was engaged in operating a railway for the transportation of freight and passengers from the city of Shreveport, in the State of Louisiana, to the city of Marshall, in Harrison county, State of Texas.

That on the day and date aforesaid your petitioner was a passenger on one of defendant's trains from said city of Shreveport going west towards the said city of Marshall; that when said train reached a point about three and one half miles from Shreveport, your petitioner being in the passenger coach, which constitutes a part of said train, the said coach was thrown from and off of the railroad track, upsetting.

That the cause of said coach running off from and being thrown from said track was the breaking of an iron rail on which
3 said train was running, which breaking of said rail was caused by the bad condition of the cross-ties which supported

said rail, said cross-ties being rotten and entirely worthless for the use made of them.

Now your petitioner shows that the entire line of road from Marshall to Shreveport is unsafe for the running of trains, and has been so for more than one year, in this, that almost all the cross-ties on said road are rotten and insecure, and make it dangerous for passengers traveling over the same on the cars of defendant.

That the condition of said road-bed as aforesaid, shows upon the part of the defendant the grossest negligence and utter disregard of the safety and security of passengers traveling over said road.

Petitioner further shows that said train upon which petitioner was traveling as a passenger as aforesaid was negligently and carelessly conducted by the persons in charge thereof, they being the agents and servants of the defendant in this; that said train
4 was a long one, composed of about sixteen freight cars, attached to and in the rear of which was the passenger coach in which your petitioner was riding. That said rail was broken as aforesaid by the engine pulling said train or by one of the aforesaid freight-cars. That the speed of said train was not checked, because the brakeman, whose post of duty was on top of said freight cars, and at the brakes, said brakes being so attached to said cars, as that they can be worked only on top of said cars, but was on the engine with the engineer and fireman, and absent from his said post of duty.

That had said brakeman been on top said freight cars, and at his brakes, as was his duty to be, he could, by applying said brakes, have wholly stopped said train, or at least have greatly checked the speed thereof, and thereby prevented the aforesaid passenger coach from running off the track and upsetting.

Now, your petitioner shows that by the accident aforesaid, caused as aforesaid by the negligence and carelessness of the defendant, he was severely and seriously injured in this, that he was thrown from his seat and violently thrown from one side of the coach to
5 another, striking the seats and other objects in said coach, by which his right hand was badly bruised, and the metacarpal bone of the little finger was broken and his back badly bruised over the lumbar region, and the three lower lumbar vertebræ badly bruised and hurt, so that his back and spine are seriously and permanently injured.

Your petitioner further shows, that from the injuries aforesaid he suffered great and constant pain, and still continues to suffer till this time, and was, for four weeks after receiving said injuries, confined to his bed and house, and unable to leave same. That he has, by his said injuries, been rendered unable to carry on and attend to his business of farming and planting, thereby causing great loss to him.

Wherefore your petitioner says that, by the injuries aforesaid, caused as aforesaid by the willful negligence and carelessness of defendant, and its servants, he has been greatly damaged, to wit, in the sum of thirty thousand dollars.

Wherefore petitioner prays that the said defendant be cited to

appear and answer this petition, and that he recover judgment for his aforesaid damages, and his costs of suit, and for general relief, &c.

N. A. STEDMAN,
A. POPE, AND
6 GEO. L. HILL,
Att'ys for Pl'ff.

File: Filed 16th April, A. D. 1879. J. L. Garrison, clerk.

1*st Amended Answer. Filed* 13*th Nov.*, 1879.

A. F. McALLISTER
vs. } 6833.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

And now comes the defendant, and protesting that this court has no further jurisdiction of this cause, and by leave of the court files this his first amended answer, amending original answer filed 9th May, 1879, and shows to the court that plaintiff ought not to have and maintain his said action, for that the allegations in plaintiff's petition are not sufficient in law to authorize this court to grant the relief therein prayed for.

And answering further, defendant denies all and singular the allegations in plaintiff's petition contained, and prays that he be held to strict proof thereof.

And amending said original answer further, defendant states that it is a corporation formed under the laws of the United States, doing business in the States of Texas and Louisiana, having
7 a railroad track and operating its business as a railroad company, by means of agents employed in the discharge of the various duties incident to the operation of a railroad. That the iron and cross-ties and other superstruction upon their road-bed so used by defendant in supporting its *its* trains were all of a good and substantial character. That said iron was purchased from first-class iron manufacturers, and the rails thereof were first class, strong, manufactured according to the most approved patterns, and, in all respects, sound and suitable for the purposes for which they were placed by defendant upon said road-bed. That the cross-ties on which said iron rested were sound and of sufficient size and strength, and were in all respects equal to cross-ties usually placed on first-class railways. And the servants of defendant in constructing said railway, and in maintaining and keeping up said track, and in running and operating the trains of defendants, were competent and skillful men, and careful and prudent in the discharge of all their duties upon said road.

And especially does defendant aver that at the time and place mentioned by plaintiff as having received the supposed in-
8 juries by him alleged, the said railroad track, iron rails, and cross-ties were sound, good, and in all respects substantial. And the servants of defendant in charge of said railroad train at the time and place mentioned were skillful, competent, and faith-

ful, and conducted said train in a prudent, cautious, and careful manner, and defendant denies that said accident complained of was caused by the negligence, carelessness, or unskillfulness of any of defendant's agents or servants, either in the running or operating of said train, or in the selection of the said iron rails or cross-tries, or in the construction of said road, but that the same was occasioned, if at all, by the action of the weather upon said railroad track, such as no human foresight could anticipate or prevent. That at the time said supposed accident occurred the weather was extremely cold, and by reason thereof and from the effects of said cold upon said track, the said iron rail alleged to have been broken became, and was, rendered brittle and liable to break, and did break, by reason thereof, and not because of any inherent weakness in said rail, and not because as alleged by plaintiff, if any rottenness or unsoundness of the cross-ties which supported said iron rail, and so defendant avers that said accident did not occur by any
9 fault or negligence of defendant, but by reason of the said facts above pleaded, which defendant could not possibly foresee or prevent.

And defendant further shows that plaintiff ought not to have any judgment in this court against defendant, for that this same suit is pending in the United States circuit court at Jefferson, Texas. That plaintiff is prosecuting his said suit in said United States court, and did, at the October term last of said court, enter his appearance therein to prosecute his suit and agree to a continuance of said cause; and defendant prays to be dismissed with its costs, &c.

TURNER, LIPSCOMB & CAMPBELL,
Att'ys for Def't.

File: Filed 13th Nov., 1879. J. L. Garrison, clerk.

Pl'ff's 1st Supplemental Petition. Filed 13th Nov., 1879.

In the District Court of Harrison County. Fall Term, A. D. 1879.

A. F. McALLISTER *vs.* THE TEXAS AND PACIFIC R'WAY CO.

And now comes the plaintiff, and by leave of the court files this, his first supplemental petition, replying to first amended answer of defendant, filed herein on the 13th day of November, 1879,
10 and says that said answer is not sufficient in law and does not set up any defence to this suit.

And plaintiff specially excepts to that part of said answer which alleges that the plaintiff is prosecuting this suit in U. S. court, because the same is a plea in abatement and is not sworn to. And also to that part of said answer which charges that the broken rail was caused by extreme cold weather, because the same fails to show that defendant could not have prevented or avoided said accident by the exercise of the utmost prudence and care.

And because said answer does not show that the weather was so cold as to be unprecedented, and because the fact that if said weather caused the iron rails to become brittle and liable to break the same,

instead if being an excuse, shows negligence on the part of the defendant.

And plaintiff, further replying to said amended answer, says that this cause was not instituted by the plaintiff in the U. S. court, but was removed there by defendant against the wish of plaintiff, and after the defendant's motion to remove same had been overruled by this court.

N. A. STEDMAN,
POPE & POPE AND HILL,
Att'ys for Pl'ff.

File: Filed 13th Nov., 1879. J. L. Garrison, clerk.

11 *Trial Am'd. of Def't to 1st Am'nd. Answer. Filed May 2d,* 1881.

In District Court. Spring Term, 1881.

A. F. McALLISTER *vs.* TEXAS AND PACIFIC RAILWAY CO.

And now comes the defendant, and exceptions having been sustained to the amended original answer of defendant, and by leave of the court amends and says that said plaintiff ought not to further maintain and prosecute this suit in this court, because it says that the defendant filed in the United States circuit court at Jefferson, in the eastern district of Texas, a certified copy of the record of the pleadings and other papers in this cause, and had the same entered upon the docket of said court, all of which was done at the fall term, 1879, of said court, and the said cause thereafter and now is pending in said court; and at the fall term, 1879, of said court the said plaintiff did make his appearance at said term of the U. S. court at Jefferson and entered an appearance therein, and filed and argued a motion to remand said cause to this court, which motion was overruled, and said U. S. circuit court decided that said cause was properly removed to said court and refused to remand said cause and entertained jurisdiction thereof; and the said plaintiff then ap-
12 pearing further in said cause agreed that the same be continued to the spring term, 1880, of said court. And at the spring term, 1880, plaintiff forced the defendant to continue the said cause, and at the fall term, 1880, the plaintiff again appeared before said court and prosecuted his said cause and consented to a continuance thereof, and at the spring term, 1881, of said court said plaintiff again prosecuted said cause in the said U. S. circuit court Jefferson, and did continue said cause. And in view of the foregoing matters and things the defendant says that said plaintiff should not be permitted further to prosecute said cause in this court, and that the same be abated and stricken from the docket of this court.

TURNER & STUART, *Att'ys for Def't.*

THE STATE OF TEXAS, *Harrison County:*

I, James Turner, attorney for and authorized to represent defendant in this behalf, do swear that the matters stated in the foregoing plea are true.

JAMES TURNER.

Subscribed and sworn to before me, this 2 day of May, A. D. 1881.
ALEX. S. FIELD, *Clerk.*
By J. B. LEWIS, *Dep'y.*

13 File: Filed May 2d, 1881. A. S. Field, clerk dist. ct., H. Co., Texas. By J. B. Lewis, deputy.

Petition for Removal to U. S. Court. Filed May 9th, 1879.

A. F. McALLISTER
vs.
THE TEXAS AND PACIFIC RAILWAY CO. } No. 6833.

To the honorable the judge of the district court of Harrison county:

The petition of the Texas and Pacific R'y Company, defendant in the above-entitled suit, respectfully shows that the above-entitled action has been brought, and is pending, in the district court of Harrison county, Texas, and is to recover of said defendant the sum of thirty thousand dollars for damages, wrongs, and injuries alleged to have been committed by said defendant. That said action is a suit of a civil nature at law, and the matter in dispute, exclusive of costs, exceeds five hundred dollars, and arises under the laws of the United States.

That defendant is a corporation, created, existing, and organized under and by virtue of certain acts of the Congress of the United States, to wit, an act entitled an act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes, approved March 3d, 1871; and an act supplementary thereto, approved May 2d, 1872.

14 That your petitioner has a defence to the said action, arising under and by virtue of a law of the United States, to wit, said act of incorporation. That your petitioner is not a banking corporation, but is a railroad corporation, authorized to construct, own, and maintain a railroad to and from certain places designated in said acts of Congress above recited.

That your petitioner hereby and herewith offers good and sufficient security for its entering in the circuit court of the United States for the eastern district of Texas, to be held at Jefferson on the first day of its next term, copies of the record of this suit, copies of all process, pleadings, depositions, testimony, and other proceedings in this cause. That it offers a bond with good and sufficient security, conditioned as required by the laws of the United States for doing such appropriate acts as are required to be done by the laws of the United States, made and provided for the removal of causes into the circuit courts of the United States for trial from State courts.

Your petitioner therefore prays that the said cause may be removed for trial to the circuit court of the United States for the eastern district of Texas, at Jefferson, and that this court accept the bond and surety offered, and proceed no further in said cause

15 F. B. SEXTON,
TURNER & LIPSCOMB,
W. STEDMAN,
Attorneys for Defendant.

File: Filed May 9th, 1879. J. L. Garrison, clerk.

Bond for Removal to U. S. Court. Filed May 9th, 1879.

A. F. McALLISTER, Pl'ff,
vs.
THE TEXAS & PACIFIC RAILWAY CO., Def't. } 6833.

Know all men that we, The Texas and Pacific Railway Company, as principal, and Herman Kretz and W. P. Hudgins, as sureties, acknowledge ourselves bound to pay unto A. F. McAllister, the plaintiff in the above-entitled suit, the sum of one thousand dollars, to be well and truly paid to him, his heirs, executors, administrators, or assigns, if default be made in the condition following:

Whereas the said A. F. McAllister has commenced a suit as above entitled in the district court of Harrison county, Texas, and which is pending therein against the said The Texas and Pacific Railway Company, and the said defendant has filed its petition and made application for the removal of said suit into the circuit court of the United States for the eastern district of Texas, at Jefferson, Texas:

Now, therefore, the condition of this obligation is such, that
16 if the Texas and Pacific Railway Company shall enter in the said circuit court of the United States for the eastern district of Texas, at Jefferson, on the first day of its next session, copies of the record of said suit, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and then and there appear, and shall do such other appropriate acts as are or may be required in the premises by the acts of Congress for the removal of causes from the State courts, and shall pay all costs that may be awarded by the said circuit court of the United States, if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise of full force.

In witness whereof, we have hereunto set our hands, this the 21st day of April, A. D. 1879.

THE TEXAS & PACIFIC RAILWAY COMPANY.
By J. D. DAVIS, *Solicitor and Agent.*
HERMAN KOETZ.
W. P. HUDGINS.

Approved.
J. L. GARRISON, *Clerk.*

File: Filed May 9th, 1879. J. L. Garrison, clerk.

17 *Order Appr'g Bond and Refusing Removal.*

A. F. McALLISTER
vs.
T. & P. R'w'y Co. } 6833.

On this the 22d day of May, A. D. 1879, came the defendant, The Texas and Pacific Railway Company, by its attorneys, and presents its petition for removal of this cause to the circuit court of the United States for the eastern district of Texas, and also presented its bond

for said removal; and the plaintiff, R. F. McAllister, also appeared, by attorneys, and both parties announced ready for trial on said motion; and the court, after hearing the argument of counsel, and having duly considered the same, adjudges the bond for removal tendered sufficient, and orders the said petition for removal be overruled; to which ruling the defendant excepts.

Exceptions to Petition for Removal. Filed 22d May, 1879.

In District Court, Harrison County, Texas. Spring Term, 1879.

A. F. McAllister
vs.
T. & P. R'w'y Co. } 6833.

Now comes plaintiff and says, that the petition of defendant to remove this cause to the United States circuit court is insufficient in law.

And for special exception, plaintiff says that said petition does not show what the defendant's defence is to said action, arising under and by virtue of a law of the United States.

18 And plaintiff denies the allegation that the defendant is a corporation created and existing under and by virtue of acts of Congress of the United States.

N. A. STEDMAN,
A. POPE, AND
G. L. HILL,
Att'ys for Pl'ff.

File: Filed 22d May, 1879. J. L. Garrison, clerk.

Motion to Require Plaintiff to Submit to Examination. Filed May 10th, 1881.

District Court. Spring Term, 1881.

A. F. McAllister
vs.
Texas and Pacific Railway Company.

The defendant at this term of the court comes and shows the court that the plaintiff has instituted the above-styled suit against defendant in this court, claiming damages in the sum of thirty thousand dollars for alleged injuries received by him while traveling on the railway of the defendant. That the alleged injury, except as to his little finger, is in the lumbar regions of the back and spine, and one of such a character as cannot be ascertained, except by a careful examination by skilled persons.

The defendant shows that the alleged injuries to plaintiff consisted of a broken bone in the little finger of the right hand,
19 and in certain bruises and hurts on the back, by which he charges that his spine and back was severely injured, and that such injuries are permanent, and will disable him for life; and

defendant refers to the petition of plaintiff, and makes the same a part of this motion to show the injury complained of.

Now defendant says that the alleged injuries to said plaintiff's spine and back are concealed and can only be known to himself, unless ascertained by an examination by skilled and competent persons.

That the defendant heretofore, to wit, on the —— day of March, 1881, proposed in writing to said plaintiff, through his attorney, George L. Hill, to have an examination of plaintiff made by physicians and surgeons with a view of ascertaining his present condition and the alleged permanency of the injury complained of, but that the proposition was declined and no such examination was made.

The defendant submits that as the plaintiff is claiming damages for internal injuries of a permanent nature, and that the defendant, if responsible therefor, has a right to know the nature and character of the injury, and submits that the extent and permanent character of the injury can only be ascertained by a thorough and
20 careful examination of the person of said plaintiff by skillful and competent physicians and surgeons, and with this view, and in order that the real condition of said plaintiff can be ascertained, he moves the court to fix a time and place, and to appoint three skillful and competent physicians and surgeons, to examine the person of said plaintiff as to the nature and extent of his injuries, that they may be able to determine the true condition of his health and the nature and extent of his injuries, and that the court order that the plaintiff submit himself to such examination.

TURNER & STUART,
Attorneys for Defendant.

STATE OF TEXAS, *County of Harrison:*

Personally appeared before me, the undersigned authority, C. B. Stuart, Jr., attorney for defendant in above-entitled case, who, being sworn, says that the facts stated in the above motion are true.

C. B. STUART, JR.

Sworn to and subscribed before me, the 10th day of May, 1881.

ALEX. S. FIELD, *Dist. Clerk.*

Filed: Filed May 10th, 1881. Alex. S. Field, clerk.

21 *Reply to Def't's Motion for Examination. Filed 10 May*, 1881.

In District Court, Harrison County. Spring Term, 1881.

A. F. MCALLISTER *vs.* T. AND P. R'W'Y COMPANY.

Now comes the plaintiff, and replying to defendant's motion filed herein on the 10th day of May, A. D. 1881, says that he is now, and has been since the institution of this suit, willing to submit to an examination by skilled and competent surgeons, upon the trial of this cause, said examination to be made in the presence of the jury and the court trying the cause. He further says that he has never

refused to submit to an examination in the manner and at the time and place as above stated.

A. F. McALLISTER.

Sworn to and subscribed before me, 10th day of May, 1881.

ALEX. S. FIELD,
Dist. Clerk, H. Co.

File: Filed May 10th, 1881. Alex. S. Field, clerk.

Order Appointing Physicians.

District Court. May 10th, 1881.

A. F. McALLISTER *vs.* TEXAS AND PACIFIC R'W'Y CO.

It was ordered by the court that Drs. T. C. Hood and W.
22 H. Dial be appointed a committee to examine said A. F. McAllister as to his injuries.

Motion to Continue. Filed May 13th, 1881.

District Court, Harrison County. Spring Term, 1881.

A. F. McALLISTER *vs.* TEXAS AND PACIFIC RAILWAY COMPANY.

And now comes the defendant and moves the court to continue this cause at this term, because the defendant cannot go safely to trial for the want of the testimony of John H. Pope, S. G. Knowlton, W. H. Able, David Rundell, and George Noble, all of whom are material witnesses for the defendant, and all of whom have been regularly served with process to appear and testify in this cause, as more fully set out hereafter. And the defendant says that J. H. Pope, George Noble, S. G. Knowlton, and W. H. Able, all reside in Harrison county, Texas, and David Rundell did live in said county from the institution of this suit until about one month ago, and since that time the defendant has not been able to learn the place of his residence, further than the fact that he has recently entered into a contract to construct a section of one of the railroads now building in the vicinity of Waco, Texas, but does not know where said Rundell has fixed his domicile.

Defendant says that all of witnesses were served with process to appear and testify in this cause, for that heretofore, on
23 the 9th day of May, 1879, defendant caused a subpœna to issue in said —— from the office of the clerk of this court, and caused the same to be placed in the hands of the sheriff of said county, commanding him to summon the said W. H. Abel, Dave Rundell, S. G. Knowlton, and J. H. Pope to appear at the spring term, 1879, of this court, and testify in this cause; and on the 14th day of May, 1879, the said sheriff served and returned the same as served, and J. H. Pope and W. N. Able and others not found. And at the fall ——, 1879, subpœnas were issued again for said witnesses to be and appear before this hon. court, to give evidence in said cause, and also at the spring term, 1880, but the said subpœna is lost from

the papers, and the date of issuance and service cannot be given. And defendant says that on the 8th of May, 1880, another subpœna was issued by said clerk, and on the same day delivered to the sheriff of Harrison county, commanding him to summon J. H. Pope, S. G. Knowlton, David Rundell, and George Noble to appear and testify for defendant in said cause, and the same was returned by the sheriff, executed on the — day of May, 1880, on the said J. H. Pope, Dave Rundell, and George Noble, S. G. Knowlton not found; and defendant further shows that at the present term of the court, on the 2d day of May, 1881, another subpœna issued at the
24 request of defendant by the clerk of this court, and was delivered to the sheriff of Harrison county, Texas, commanding him to summon S. G. Knowlton, David Rundell, J. H. Pope, and George Noble to appear at the present term of this court, and give evidence in this cause on behalf of the defendant; that on the same day said subpœna was delivered to the said sheriff, who executed the same, and returned thereon, executed on J. H. Pope and George Noble in ample time for them to be at the court, and that Knowlton and Rundell were not found; and the said subpœnas and all returns thereon are each and all of them here referred to and made part of this application. Defendant says that the said J. H. Pope is an experienced surgeon, who has studied the results of the injuries that the plaintiff claims to have received, and the usual effect of such injuries upon the human system, and said witness at one time, soon after the said plaintiff was injured, saw the said plaintiff and examined him slightly at the time, and defendant expects to prove by the said Pope that from the examination of said plaintiff, made by him, that the injury to him was slight, and was not calculated to result in permanent injury or disability to said plaintiff; and the defendant expects further to prove by said Pope, that if the said plaintiff had been injured in the manner
25 claimed by him in his petition, and in the manner described by L. Rhodes, a witness of plaintiff, whose deposition is on file in this court as part of plaintiff's evidence, that the same would have been attended by symptoms and results entirely different from those claimed by him; and, further, that the medical and scientifical conclusions deduced by said Rhodes from the injuries to plaintiff, as detailed by said Rhodes, are not correct, and that the conclusion of Rhodes is erroneous.

That the defendant does not know the reason of said Pope's absence, or why he is absent.

And defendant expects to prove by witness Knowlton and David Rundell that the first was superintendent of bridges on the defendant's road, and was especially charged with looking after and clearing away all wrecks on the road at the time of the wreck wherein plaintiff claims to have been injured, and that the latter was supervisor of the track of the defendant's road between Marshall, in Texas, and Shreveport, in Louisiana, and that both of said witnesses were at said wreck, and helped to clear it away and repair the track where it occurred; that both of said witnesses are experi-

enced and competent railroad men, and judges of the condi-
26 tion and safety of railway tracks and structures in general.

That said witnesses made a thorough and complete examination of the track where the wreck occurred, and examined into the condition and soundness of the ties and iron rails at the point where the wreck occurred, and both of said witnesses will testify that there was no visible or apparent cause for the breaking of the iron rail that caused the accident; that the rail was apparently a sound and good rail, and they could discover no visible or latent defect in the said rail to cause the break, and the fracture appeared to be new. That they examined the ties in the road-bed at the point, and discovered one or two broken ties, but neither one of the broken ties were under the portion of the rail where the fracture occurred. That the ties were good, sound ties, but were not entirely new. They will say that the accident was not caused, as is alleged, by rotten ties, that gave way, causing the rail to break, as is charged in the petition. And Rundell will swear that the road on that section had been recently overhauled, and new ties put in wherever they were needed, and that it is untrue that the ties were rotten and gave way, causing the rail to break.

Defendant says that Knowlton has been in its service until
27 within about twelve months, in charge of the bridges on the road.

That about one year ago the said Knowlton went out of defendant's service, and was interested in certain coal mines in the vicinity of Palo Pinto county, and was much of his time out at said mines, but that he still claimed and resided at Marshall, and is not fully advised relative thereto, but is informed and believes that he still claims Marshall to be his home.

That he was frequently in Marshall, and was here as late as the first of the present month, and defendant was advised and believes he would be here at this trial, and so believed until on or about the —— day of May, 1881, on which day it was for the first advised that Knowlton had gone to Cotile, in Rapides parish, Louisiana, and on the same day filed interrogatories to take his depositions, and caused them, with a commission, to be sent to Cotile to take the deposition of said witness, to a proper officer and the usual fee, but that the same have not been returned, nor has there been sufficient time.

That witness Rundell left the service of defendant about January first, 1881, but still continued to reside in Harrison county and left in February, as defendant is informed, and since then has been traveling over the different railroads in Texas that are in
28 process of construction, without any fixed location. And defendant, through its agents, has repeatedly attempted to find and ascertain the location of said witness, but has been unable to ascertain it, further than that he has contracted for a portion of the work on one of the railroads being built near Waco, Texas, but this information was not received until about the 10th of May, 1880.

The defendant will be able to have the testimony of both of said witnesses at the next term of this court.

And defendant expects to prove by the witness, W. H. Able, that he was in charge of the train on which plaintiff received his alleged injuries as the conductor in charge; that said train was run carefully and at a reasonable and moderate rate of speed; that he was on the train at the time of the wreck, and examined the scene of the accident; that he could ascertain no cause for the break of the rail, and that the road-bed appeared in good condition and ties sound.

That he saw plaintiff after the wreck and at the scene of the accident, and that said plaintiff made no complaint of any injury to spine or back, or any other injury, except his little finger, and that he did not appear to be injured in any other way, and made no complaint that witness heard of.

29 Defendant says that said Abel still holds his residence to be at Marshall, although the said witness has been traveling from point to point as a timber inspector for certain parties constructing the western extension of defendant's road; that said witness was at Marshall about the first of April, 1881, and the attorney of defendant approached him with the view of taking his deposition in this cause, but that said witness stated that he was forced to go away on the same day, but that he would return in about a week, so as to afford the desired opportunity of taking his deposition, but that said witness failed to return as he promised, and defendant has had no opportunity of taking it since. That since Able quit the service of defendant he has been constantly traveling from point to point, rendering it impossible to take the depositions of said witness, the said defendant not being able to ascertain his whereabouts.

The defendant is informed and believes that said Able was unexpectedly called away on business to some one of the Northern States, and is now temporarily absent from the State; that defendant will be able to procure the testimony of said witness at the next term of this court; that defendant expects to prove by George Noble that he was, at the time of plaintiff's alleged hurt, general superintendent of said defendant's railroad; that he was well ac-

30 quainted with the condition of the road between Marshall and Shreveport at the time of plaintiff's alleged injury; that said road between Marshall and Shreveport was in good repair, and that the ties were not rotten and worthless, as is alleged in the petition, and that the iron was, to all appearances, sound, and the ties durable and road safe; that the defendant does not know the reason of the absence of said witness, and expects to have his testimony at the next term of this court.

The defendant says that it has used due diligence to cause the attendance of said witnesses, and to procure their testimony, as is hereinbefore more fully set out; that the testimony of all of said witnesses is material, and proving the several allegations of the answer of defendant, and disproving the allegations of said plaintiff's petition; that the defendant is not informed of the reason of the absence of said witnesses, except as hereinbefore stated; that the testimony of said witnesses cannot be obtained from any other

source, and defendant further says that this continuance is not sought for delay only, but that justice may be done.

JAMES TURNER AND
C. B. STUART, JR.,
For Defendant.

I, James Turner, do swear that the facts stated in the above
31 affidavit are true, to the best of my information, knowledge, and belief, and that said defendant is a corporation, and said attorney is duly empowered by the defendant to defend this cause and make this application, and is more conversant with the matters contained than any other agent of defendant.

JAMES TURNER.

Sworn to and subscribed before me, this May 13th, 1881.

ALEX. S. FEILD,
Dist. Clerk, H. Co.

File: Filed May 13th, 1881. Alex. S. Feild, clerk.

Counter Affidavit of Plaintiff. Filed May 16th, 1881.

Suit Pending in the District Court of Harrison County. Spring Term, 1881.

A. F. MCALLISTER *vs.* TEXAS AND PACIFIC RAILWAY CO.

And now comes the plaintiff in this cause and, leave of the court being granted, presents to the court the following counter affidavit in answer and opposition to the application for continuance presented by the defendant, and show:

1st. That the witness George Noble, named in said application, is the same person who for seven years past has been the general superintendent of the Texas and Pacific Railway, the property of
32 defendant, and the line of railway upon which said injury, complained of by plaintiff in his petition, was received.

That about one month ago said Noble tendered his resignation as said superintendent, and the same was accepted by the said defendant, through its board of directors, to take effect on May 1st, 1881, on which said last-named day the said Noble ceased to have any connection with said defendant in the management of its business affairs.

That this fact of the resignation of said Noble and its acceptance was a matter of public notoriety in this community, and it was also a fact of public notoriety that the said Noble would, as soon as he had severed his business relations with said defendant, remove from the State of Texas to the State of Kansas, and particularly was this fact known to the defendant, and was known to said defendant at least four weeks ago, and in ample time to secure his depositions; and the plaintiff shows that the said Noble left this town for Kansas on the 12th of May, 1881, in pursuance of his publicly declared intention so to do, which intention was made by the said Noble,

issuing a printed circular over his own name, directed to the officers and employees of said defendant.

That said circular was promulgated on about the — day
33 of ——, 1881, and was distributed among the officers and employees of defendant, and the day of his intended departure was well known to defendant several days before hand, and in ample time to have taken his deposition.

2d. As to the witness W. H. Able, the plaintiff says that he has not been a citizen of Harrison county for several months, but is, and has been since October last, a citizen of Fort Worth, in Tarrant county, Texas, and was there when the application for continuance was filed, in proof of which plaintiff hereto attaches a telegram received from D. W. Washburn, chief engineer of Pacific Improvement Company, by plaintiff, on 14th day of May, 1881.

[Copy of Telegram.]

"Dated FORT WORTH, *May 14th*, 1881, 2 p. m.

"Received at ———.

"To A. F. McALLISTER:

"W. H. Noble is in employ of Pac. R'y Imp. Co.; he left Fort Worth last night for Bird's Point, on I. M. R. R.

"D. W. WASHBURN."

Said witness has been, since leaving Marshall, as aforesaid, in the employ of the Pacific Railway Improvement Company, with his headquarters at Fort Worth, where defendant could have
34 taken his deposition, all of which was well known to defendant for several months past, said Improvement Company having been, and now is, engaged in the construction of defendant's road westward to El Paso. Said city of Fort Worth is in the line of defendant's road, and about one hundred and eighty miles west of Marshall.

3d. As to the witness David Rundell, plaintiff says that he left Marshall and Harrison county in September last, and moved to and made his home in the city of Dallas, in Dallas county, Texas, which is on the line of defendant's road, and about one hundred and fifty miles west of Marshall. That during this time he has been engaged in building the Dallas and Wichita Railroad for the defendant, and has been in frequent communication with defendant, and was, about one month ago, in the city of Marshall, on business with defendant and in defendant's main office; all of which facts were well known to defendant, and has been all the time, that it could take said witness' deposition in the city of Dallas, where he has been residing ever since he left Marshall, as aforesaid.

4th. Plaintiff says that the said witnesses have never been in attendance upon this court to testify in this case, in obedience to subpœnas served upon them.

Plaintiff asks the court to hear evidence in proof of the
35 facts alleged in this affidavit, and here tenders to the court witnesses in support thereof.

A. F. McALLISTER.

Sworn to and subscribed before me, this the 16th May, 1881.

ALEX. S. FIELD,
Dist. Clerk, H. Co.

File: Filed May 16th, 1881. Alex. S. Field, dist. clerk.

Subpœna. Issued 2d May, 1881.

THE STATE OF TEXAS, *County of Harrison:*

To the sheriff or any constable of Harrison county, Greeting:

You are hereby commanded to summon S. G. Knowlton, David Rundell, S. E. Waskom, S. F. Vaughan, John H. Pope, B. F. Eads, Volney Hall, George Noble, and J. H. Thomas to be and appear before the district court of Harrison county, in the city of Marshall, instanter, then and there to give evidence in a certain case pending, wherein A. F. McAllister is plaintiff and the Texas and Pacific Railway Company is defendant, for and in behalf of defendant, and there remain from day to day, and from term to term, until discharged by said court.

Herein fail not, and make due return of this writ as the law directs.

36 Attest, A. S. Field, clerk of the district court of Harrison county, and seal of the same, at my office, in the city of Marshall, this 2d day of May, 1881.

ALEX. S. FIELD,
Dist. Clerk, H. Co., Texas.

Sheriff's Return.

Came to hand May 2d, 1881, and executed May 10th, 1881, by reading the within subpœna to each of the within-named witnesses, each in person, except S. G. Knowlton, J. H. Thompson, and Dave Rundell, they not being found in my county.

S. R. PERRY,
Sheriff of H. Co., Texas.
By S. J. BERRY, *Dep'y.*

File: Issued 2d May, 1881. Alex. S. Field, dist. clerk H. Co., Texas.

Subpœna. Issued 8th May, 1880.

THE STATE OF TEXAS, *County of Harrison:*

To the sheriff or any constable of Harrison county, Greeting:

You are hereby commanded to summon S. G. Knowlton, David Rundell, S. E. Waskom, S. F. Vaughan, John H. Pope, B. F. Eads, Volney Hall, George Noble, and J. H. Thompson to be and appear before the district court of Harrison county, at the court-house in the city of Marshall, instanter, then and there to give evidence in a certain case pending, wherein A. F. McAllister is plaintiff
37 and Texas and Pacific Railway Company is defendant, for and in behalf of defendant, and there to remain, from day to day and from term to term, until discharged by said court.

Herein fail not, and make due return of this writ as the law directs.

Attest, J. L. Garrison, clerk of the district court of Harrison county, and seal of the same at my office in the city of Marshall, this 8th day of May, A. D. 1880.

J. L. GARRISON,
Dist. Clerk.

Sheriff's Return.

Came to hand May 8th, 1880, and executed May —, 1880, by reading the within subpœna to the within named witnesses, each in person, to wit, John N. Pope, B. F. Eads, Volney Hall, George Noble, J. H. Thompson, S. F. Vaughan, Dave Rundell, the following named witnesses, not found in my county, to wit, S. G. Knowlton, S. E. Waskom.

S. R. PERRY,
Sheriff of Harrison Co., Texas.
By S. J. BERRY, *Dep'y.*

File: Issued 8th May, 1880. J. L. Garrison, dist. clerk.

38 *Subpœna. Issued 9th May*, 1879.

THE STATE OF TEXAS, *County of Harrison:*

To the sheriff or any constable of Harrison county, Greeting:

You are hereby commanded to summon W. H. Able, W. J. Waldron, A. W. Wood, A. Bristow, Dave Rundle, S. G. Knowlton, Dr. J. H. Pope, Dr. Calhoun, Dr. S. F. Vaughn, to be and appear before the district court of Harrison county, at the court-house in the city of Marshall, instanter, then and there to give evidence in a certain case pending, wherein A. F. McAllister is plaintiff and the Texas and Pacific Railway Company is defendant, for and in behalf of defendant, and there remain, from day to day and from term to term until discharged by said court.

Herein fail not, and make due return of this writ as the law directs.

Attest, J. L. Garrison, clerk of the district court of Harrison county, and seal of the same, at my office in the city of Marshall, this 9th day of May, A. D. 1879.

J. L. GARRISON, *Dis. C'k.*

Sheriff's Return.

Came to hand May 9th, 1879, and executed May 14th, 1879, by reading the within subpoena to John H. Pope, W. H. Abel, S. F. Vaughn, each in person; the others of the within named witnesses not found in my county.

S. R. PERRY,
Sheriff of H. Co., Texas.
By S. J. BERRY, *Dep'y.*

File: Issued May 9th, 1879. J. L. Garrison, district clerk.

39 *Order Overruling Motion for Continuance.*

A. F. McALLISTER
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } 6833.

The motion of defendant for continuance coming on to be heard, after hearing the argument of counsel, and being fully advised, the court doth order that said motion be, and the same is, overruled.

Statement of Facts.

In the District Court of Harrison County, Texas. April Term, 1881.

A. F. McALLISTER
vs.
TEXAS AND PACIFIC RAILWAY COMPANY.

Be it remembered that on the trial of the above-styled cause in the district court of Harrison county, Texas, at the April term thereof, A. D. 1881, the following facts were proved:

ALICK BRISTOW, being duly sworn as a witness for plaintiff, testified as follows, viz:

In February, 1879, I was a brakeman on a train of the Texas and Pacific Railway Company running between Shreveport, Louisiana, and Marshall, Texas. Said railway was at that time being managed and controlled by defendant. W. H. Able was the conductor of said train, and W. H. Wood was a brakeman thereon.

On the 10th day of February, 1879, said train was coming from Shreveport to Marshall, and when it reached a point 3½ miles
40 west of Shreveport, at about 3 o'clock p. m., the passenger car, which was attached to the rear end of said train for the purpose of conveying passengers, ran off the track and turned over down an embankment five feet high, and when it reached the ground it was nearly bottomside up. At this time I was on the tender going back to my proper position, on or near the third freight car from the front, the train being a mixed train, with about 15 freight cars, one baggage car, and one passenger car. The train was running about 8 miles an hour; as soon as the train stopped I went back to the passenger coach, which I found in the position I have mentioned.

The plaintiff was a passenger on said train. A broken rail was the cause of the train running off. I examined the place where the rail was broken and found about five feet of the rail broken off, and the cross-tie upon which said railroad had rested broken to pieces.

The rail was broken at the east of a bridge eight feet wide and ten feet long. I noticed on the ties impressions made by the wheels of the coach as they passed over the bridge on the ties, none of the ties of the bridge being broken by the passing of the wheels over the same.

The bridge was new and the ties on it were new and sound.
41 Three of the cross-ties under the broken rail were unsound and broken. It was raining, but the weather was not cold.

After the train had stopped I discovered that a box car about five cars in advance of the baggage car was off the track also. The car passed over the bridge before turning over.

Cross-examined, said witness stated:

After the accident I saw plaintiff in the baggage-car, lying on cushions. I suppose the coach broke the rail. The ties were not very good; they were pretty rotten; they were not real rotten; they were old and seasoned, but not sound. I work in the shops of defendant, in Marshall, Texas. I was summoned as a witness on Monday before the trial. I never conversed with any one, except plaintiff, about this case. This was a good while ago; spoke a few words with him once or twice, a short while ago. After the last talk, he requested me to appear as a witness in the case. I saw the coach was off the track after the train had stopped. I don't know whether the freight car was thrown off at the broken rail or not. I don't know which car broke the rail; I lay it on the coach. It would have no effect in stopping the train to put on brakes after the car had gotton off the track. It had been raining several days before the wreck. It was neither cold winter time nor hot summer
42 time. It was not very cold. I do not know what month of the year the wreck occurred, but it was either in the latter part of the winter or the early part of the spring. It was the only wreck that ever happened when plaintiff and I were on the same train, and it was the only one that ever occurred at the place mentioned. I didn't brake on said train much longer; I was pulled off; I was discharged, but went immediately to work on the International railroad.

Re-examined, the witness BRISTOW said:

Mr. McAllister was at the wreck. I worked three or four months at the round house after the wreck. I went back again to work on the International road, and then came back here, and I am now in the service of defendant.

J. M. DUNN, being duly sworn as a witness for plaintiff, testified as follows, viz.:

I reside in Greenwood, Louisiana, and am acquainted with plaintiff. I remember the wreck on defendant's railway, about 3½ miles west of Shreveport, Louisiana, on the 10th day of February, 1879. There were several other passengers besides plaintiff and myself in the passenger coach of said train. The coach in which we were seated ran off the track and turned almost completely over down an embankment about five feet high. I was slightly hurt my-
43 self. I saw plaintiff after he had gotten out of the coach. Plaintiff complained that his hand and back were injured. Cushions were fixed in the baggage car for plaintiff to lie down on. When I went into the baggage car, after the coach was thrown from the track, I found plaintiff on the cushions, in which position he remained until we arrived at Greenwood, and when I got off he was still there. We were delayed at the wreck about an hour.

I did not examine the cause of the accident, but saw that there was a rail or piece of a rail broken out of the track. It was a rainy day, but not very cold. There was no fire in the baggage car. I cannot state whether it was cold ten days before the wreck, but I remember that it was very cold two or three weeks before that time. I got on the baggage car about the same time plaintiff did, and saw no one assist him in getting into the baggage car.

Plaintiff next read in evidence in his behalf two sets of depositions of Dr. Rhodes, in which he testified as follows:

Depositions of Dr. L. Rhodes, taken on 23d day of October, A. D. 1879.

Dr. L. RHODES testified, by deposition, that he was a practicing physician, and had been since 1861, at his present residence,
44 and that he had known plaintiff since 1849, at his present residence; that about the 11th of February, 1879, witness saw plaintiff about 12 m. at his residence; was sent for as a physician to see plaintiff, and that witness found plaintiff lying down in bed. That witness made an examination of plaintiff; that witness examined the person of plaintiff, and found plaintiff suffering very much from injury of right hand and back. Witness said he discovered a dislocation of the metacarpal bone of the little finger of the right hand; that he also found over the lumbar region of the back that it was considerably swollen, with a great deal of tenderness over the third lower lumbar vertebræ. That witness saw plaintiff every few days until March 7th, 1879, confined to his (plaintiff's) bed most of the time from spinal injury he (plaintiff) had received. The injuries I found on plaintiff I would say, as a medical man, were caused by a direct blow or fall on some hard, solid body.

Witness said he had made subsequent examinations of the plaintiff every 8 or ten days since the injury, and every examination witness found tenderness over the region of the spine. Witness said that on making examination of plaintiff on October 23d, 1879,
he found tenderness of spine still existing over the
45 third and fourth lumber vertebræ, which shows that the spine has been seriously injured, or tenderness would not still exist. Witness said that it was his opinion as a physician that plaintiff will never recover entirely from the injuries he has received, and that they my result finally in paraphligia (palsy of lower half of body). That plaintiff's occupation was that of a farmer, and that said injuries render plaintiff unable to attend to his business as it should be, as he is unable to ride on horsback or walk but a short distance without suffering with his back.

Cross-examination:

Witness said that he was a graduate of medical department of the University of Louisiana in 1860, and that he saw McAllister February 11th, 1879, and most serious injury was located over lumber region of spine manifested itself externally by an extensive bruise and tenderness of spine. That there was a bruise that extended across the lumber region of back, about four inches in width and

very dark. Metacarpal bone of little finger of the right hand was dislocated at upper end, where it joins unciform bone. That he had not given an opinion as to what caused McAllister's injuries; that he did not see him injured, and that as to probable result of injuries he based his opinion upon his experience and observation,
46 and that of other medical authority. That [it] is very seldom anyone of McAl-ister's age recovers from *from* severe spinal injury of back, and if the spinal organ is much injured an entire recovery is hardly to be expected, and from the long standing of the injury there is but little improvement.

Dr. L. RHODES testified by deposition *by deposition* on 15th of April, A. D. 1880, for plaintiff, said:

I have known plaintiff since 1849, at his present residence. I am a pr-cticing physician, and have been since 1861. I saw plaintiff on 11th day of February, 1879, about 12 o'clock m., at his residence. He, plaintiff, had sent for me as a physician to see him. I found him lying in bed. I examined him, and found him suffering very much from injury of right hand and back. I discovered a dislocation of the metacarpal bone of the little finger of the right hand, and I found the lumbar region of plaintiff's back considerably swollen, with great deal of tenderness over the three (3) lower vertebræ. I saw plaintiff every few days until 7th of March; he was confined to his bed most of the time from spinal injury he had received. These injuries were caused by a direct blow or fall on some hard, solid body. I have made an examination of plaintiff every eight or ten days since the injury, and at every one of these
47 examinations I found tenderness over the region of the spine. I remember an examination on the 23d of October, 1879, and I found tenderness to exist over the third and fourth lumbar vertebræ, which showed that the spine had been seriously injured, or tenderness would not have existed. On the 15th of April, 1880, I made an examination of plaintiff, and found his condition to be worse than it was at the examination I made on the 23d of October, 1879. I found him less able to walk or ride than in October, 1879, such exertion producing considerable pain. It is my opinion that plaintiff will never entirely recover from his injury, and may result finally in para*ph*legia, or palsy of lower half of body. Plaintiff is a farmer, and said injuries render him unable to attend to his business as it should be, as he is unable to ride on horse-back or walk but a short distance without suffering with his back. My services for attending on plaintiff as his physician were worth two hundred and fifty dollars.

To the cross-interrogatories witness said:

That he based his opinion as to the character of injury and condition of plaintiff from the locality of and extent of injuries which plaintiff received. I have the opinion that plaintiff will
48 never entirely recover from the injuries received, and that he is incapacitated to attend to his farm business as a farmer, be-

cause he is unable to ride or walk but a short distance without much pain in the back, which I have ascertained by making examinations of plaintiff after he had taken such exercise, and found the tenderness to be increased.

A. F. McALLISTER, the plaintiff, being duly sworn, testified as follows, viz.:

I was in Shreveport, Louisiana, February the 10th, 1879. I took passage at Shreveport, on said day, on defendant's train of cars, intending to go to Waskom station, on the line of defendant's road, about 20 miles west of Shreveport; it was about two o'clock of said day. I had gone down from Waskom station to Shreveport that morning on the defendant's train of cars. Before leaving Waskom's I bought a ticket from the defendant's depot agent, which was a round-trip ticket to Shreveport and return. After leaving Shreveport the conductor of the train took up said ticket. I lived then about 6½ miles from said station, and was engaged in farming and merchandising. When we had reached a point about three and a half miles west from Shreveport, the passenger coach in
49 which I was sitting ran off the track and turned down an embankment about five feet high, the top of the coach resting on the ground and the bottom upwards. I was sitting on a seat in the coach reading a newspaper. I heard the trucks of the baggage car, which was immediately in front of the passenger coach, pass over a rough place, and at once the front trucks of the passenger coach struck same thing, which caused a jar, and some garden seeds which I had placed in the rack over my head fell down, and, striking the paper I was reading, knocked it out of my hand. I immediately tried to brace myself by taking hold of the seat; but when the coach upset I fell down into the top of the coach, the lower part of my back striking upon a rafter. I was stunned by the blow. When I recovered I was suffering greatly with my right hand, and felt a numbness in my back. I got up and left the coach and went out upon the side of the track, and remained there until the train was ready to go. I asked the conductor to back the train (it having gone about one hundred yards, after breaking loose from passenger coach, before stopping) that we might get on. He said he could not do so, as one of the freight cars was off the track. I was assisted into the baggage car, and lay down upon some
50 cushions which had been arranged for me. I lay upon the cushions until we got to Waskom's station, when I was assisted off the train. When passing Greenwood, (which is between where the accident occurred and Waskom's,) Dr. Calhoun came into the car where I was and examined my hand. The conductor got me a bottle of liniment, and Ross Wilkenson, who was also a passenger, rubbed my hand and back with it. I staid that night at Waskom's station with Mr. Powell. I had fever all night and slept but little. I rode home on horseback next morning 6½ miles. Immediately on arriving at home I went to bed and sent for Dr. L. Rhodes, under whose treatment I was regularly for about a month,

and more or less for about six months, when I left my plantation and moved to Marshall. Dr. Pope and Vaughan visited me at my house three days after I was hurt. They found me lying down on a reclining chair on some pillows. I then got on to the bed and they made an examination of my hand and back. Dr. Pope said I had fever. I was confined to my house for a good while, and suffered a great deal all the time. I used looking-glasses to see my back. A month after receiving my injury the lower part of my back was perfectly black. A dark appearance was there until
51 the middle of April. When I first left the house I attempted to walk in the field. After walking two hundred yards I had to stop and rest on account of pain in my back. It was six weeks after the accident before I was able to go about. I walked very little. I was farming then. I have been doing very little of anything since. (Here the witness was asked the question, "Why did you abandon farming?" which question was objected to by defendant, and which objection was overruled by the court; to which ruling the defendant excepted.) In answer to the foregoing question the witness said: I quit farming because I could not ride horseback, and could not walk. I tried three times to ride horseback. The first time I rode a mile and it made by back hurt. The second time, two or three weeks afterward, it was the same way. I went to bed from the effects of it. The third time I rode on horseback was in July. I rode a mile and a half with the same effect as before, the difference being it did not hurt me so bad, and I did not lay up so long. I have never tried it since. I travel in a buggy. Sitting up too long causes a stiff, sore feeling in my back. Before my injury I was an active man, since then I have not been so. I never sit up all day. I lie down a portion of it. If I don't I suffer. I earned for myself and family before my injury from $3,000 to $3,500
52 dollars a year; I have earned nothing since I was hurt; been living here since last October; I am a man of family, and was married in 1867; my age at the time I was hurt was 41 years; have been under the treatment of physicians since I have been here; I went to St. Louis the 17th of last month, and stopped at Hot Springs, Ark.; riding on the cars worried and fatigued me; I lived in the depot part of the time; I walked down town in the morning; my walking is irregular, my lower limbs weak; I sometimes feel cold, chilly sensations in my legs; when I go up steps I fell an uneasy feeling in my legs; the coldness in my legs occurs when I walk too much; the sensation is very little below the knees; there is a part of the lower portion of my back which is sore to the touch; stooping is very disagreeable, and an upright position for any length of time is very disagreeable. There is no difference between my sensations now and a year ago, except the cold sensations spoken of are greater. The dark colored point of injury on my back disappeared about two months after the injury was received. My step is unsteady in walking, and my heels sometimes drag as I walk; can't stand on one foot; can walk but a short distance at a time; get fatigued easily, and have to lie down 3 or 4 hours every day; get very sore in my back when I take ex-

53 ercise; go up steps with some difficulty, and go down with greater difficulty; have a numbness and tingling in my legs and hips, and sometimes after exercising have cold sensations in my legs; can't stoop without pain in my back; can't make a sudden turn without pain; can't sit erect but very short time; have tenderness to the touch at point of injury; suffer from soreness of back and with twitching of the muscles of my legs after walking; weighed before injury over 200 lbs., and since about 180. My desire for sexual intercourse I think is not so great as before I was injured. I was nearly 41 years old at the time I was hurt. I earned from $3,000 to $3,500 per day before I was hurt, owing to my injuries I have earned nothing since. I am poorer now than I was twelve years ago, have lost money in that time. The $3,000 to $3,500 per year made by me was not above expenses, it included my own labor, products of my farm, and profits of my business generally. I could hire a man to oversee my farm for $500 a year. I was a candidate for the office of tax collector last year at the election; did not expect to be able to do all the work of the office myself if I had been elected; was not able to travel and electioneer, or think possibly might have been elected; I suppose could walk a mile and a half a day altogether. There was no noticeable effect
54 in my feet and lower limbs immediately after I was hurt. My general health is good. I have good appetite; digestion good. My bowels not injured; bladder and urine as before injured; genital organs not affected, save that I have less desire than before for sexual intercourse. I have not ploughed or since I was a small boy. I rented a portion of my farm before I was injured. A great many farmers are quitting the business of farming. My farm, since I left it, has been a portion of the time partly, and a portion of the time entirely, rented out. I am not able to attend to it, and am living in Marshall for the purpose of educating my children.

Dr. C. H. McGILL, next witness for the plaintiff, being duly sworn, testified that he was a citizen of Marshall, Texas, and was in the insurance business, both life and fire insurance. There are tables that are recognized by all life insurance companies as correct estimates of how long a man will live at the different ages. The Carlisle table is one that is recognized as a correct table by all life insurance companies, and the general public so look upon it and take it to be a correct estimate of a person's life. A person that is forty-one
55 years of age would, as a general rule, live twenty seven and $\frac{45}{100}$ years longer.

Cross-examined:

I say that a person forty-one years of age would, as a general rule, live twenty-seven and $\frac{45}{100}$ years longer from the estimate laid down in the Carlisle table of expectation of human life. There are also other tables that are recognized as correct, but there is no material difference between them and the Carlisle table of expectation of human life.

The defendant filed a motion asking the court to appoint a board

of physicians to examine the plaintiff to ascertain the nature and extent of his injuries. The motion was granted, and the court appointed Dr. W. H. Dial and T. C. Hood to make an examination of plaintiff's person to ascertain the nature and extent of his injuries, which examination was made by said physician in a private office out of court.

Dr. W. H. DIAL, one of said examining physicians, was placed on the stand by plaintiff, and being duly sworn, testified as follows, viz: I am a physician of thirty years practice, and a graduate of the university of New York. I was appointed by the court to ex-
56 amine plaintiff in connection with Dr. Hood, also appointed for that purpose. Plaintiff went with us to the office of George L. Hill, esquire, when we made the examination. We caused plaintiff to strip, and we examined his hand and spine. There were no visible signs of injury. By pressing on the right side and immediately against the third or fourth lumbar vertebra we noticed that plaintiff flinched from the pressure. We found that one of the bones of the little finger of the right hand had been either broken or dislocated. We asked plaintiff about [it], and he told us the history of his injuries and his symptoms, and from that and the examination I am of opinion that his injuries are permanent.

The plaintiff propounded to the witness Deal the following questions, viz:

A man is upon a railroad car while a train is running at a moderate rate; the coach in which he is riding is thrown from the track by a broken rail and turns over an embankment five feet high; he is thrown from his seat and falls into the top of the car, upon his back, the lumbar vertebræ of his back striking on a rafter; he is insensible for a short time; revives and walks out of the car, and after about thirty minutes is assisted into another car; is laid upon cushions, and is carried by the train a distance of about 19 miles; is assisted off the train; spends the night with a friend; has
57 fever all night; gets up next morning and rides on horseback about 6½ miles; goes to bed, and, under treatment of a physician, remains in bed and in a reclining chair, together about four weeks, after which he walks out; goes about 200 yards, and is compelled to return on account of pain in his back. During all this time his back, at the point of injury, is dark and colored, which disappears at about two months after the injury was received; tries to ride on horseback and cannot do so, because of pain in back; repeats the attempt twice afterwards, the last time about five months after receiving the injury, with the same result. Two years and three months elapse; his step is unsteady in walking, and his heels sometimes drag as he walks; can't stand on one foot; can walk but a short distance at a time; gets fatigued easily, and has to lie down 3 or 4 hours every day; gets very sore in the back when he exercises; goes up steps with some difficulty, and goes down steps with greater difficulty; has a numbness and tingling in his legs and hips, and sometimes, after exercising, has cold sensations in his legs; has,

to some considerable extent, lost his desire for sexual intercourse; can't stoop without pain in his back; can't make a sudden turn without pain; can't sit erect but very short time; has tender-
58 ness to the touch at point of injury; suffers great soreness of lower limbs and back, with twitching of the muscles of his legs, after walking; weighed, before injury, over 200 pounds, and since about 180, with good appetite and digestion. What would you say was the extent and what would probably be the result of the injuries of a person afflicted in the manner indicated by the foregoing question?

To which the witness answered:

I am of the opinion that the injuries indicated by the foregoing question would be permanent and would finally result in paralysis. The lumbar vertebræ is below the seat of the nerves which lead-*ing* to the kidneys, bladder, and bowels. The nerves leading from the lumbar vertebræ are the nerves which pass into the lower limbs. The cervical vertebræ is the center of the nerves which lead to kidneys, bladder, and bowels. Therefore, an injury of the lumbar vertebræ would only affect that portion of the system of which the lumbar vertebræ is the nervous center, and would leave the kidneys, bowels, and digestive organs unaffected. It would be possible, however, for the shock to be so great at this point so as to affect the whole system.

59 It is the custom and rule among physicians in diagnosing diseases and injuries to learn the symptoms from the patient, and there is no other way of determining the extent of an injury, except from what the patient says, except those plainly vissible.

Cross-examination of Dr. W. H. DIAL:

Paralysis has well-defined symptoms. If a person is injured in the spine sufficient to paralyze, the kidneys, bladder, urine, and genital organs would be affected, and are sufficient to permanently disable a man—would probably develop itself in two years, and there might be cases were it would take longer. I saw nothing in the appearance of the plaintiff's body to indicate any permanent injury. There was no scar and no swelling. I do not know whether the flinching of plaintiff was voluntary or involuntary when we pressed against his back. My opinion as to the perman-cy of the injury of the plaintiff was founded upon what he said to me when I, in connection with Dr. Hood, under the order of the court, examined plaintiff. An injury of the spine at a point which would affect the kidneys, the bladder, and the bowels, if severe enough to produce paralysis, would compel the patient to urinate with artificial aid, and would also affect the bowels, and the patient could not control his evacuations.
60 It would also effect the genital organs. Such an injury would generally effect all the functions of the body below the seat of the injury if severe enough to produce paralysis. The general health of the patient would be impaired, and the lower extremities would wither and waste away. If I knew a person that was struck a blow sufficient to bruise the whole surface of the back, and

keep him in bed two months from the severity of the shock, and if after two years his general health was good, his bowels regular, his kidneys and urinary organs in good condition, I would say that that person was not permanently injured. I have not stated that plaintiff was permanently injured; all I can say is, a person having such symptoms stated by the plaintiff to Dr. Hood and myself when we made the examination and embodied in the question propounded to me is, in my opinion as a physician, threatened with paralysis. I never saw a case of permanent spinal injury that the general health was not impaired. I am not able to tell *with* the injury to plaintiff's spine was a fracture or a concussion. We applied no test, except pressing upon the spine of plaintiff, and receiving from plaintiff the statement of his condition; we applied no other scientific test.

Re-examined:

61 No one can tell certain from any test that I know of the extent of a spinal injury unaided by statements of the patient as to his symptoms. There are cases reported in medical books where paralysis developed several years after the injury. The effect of injuries to the spine spoken of in my cross-examination have referred more particularly to portions of the spine higher up and above the lumbar region.

Re-cross-examination:

As soon as we had completed our examination of the plaintiff, and the court had adjourned, Dr. Hood and myself went to the office of the attorneys of plaintiff and told the said attorneys the result of our examination, and we did not tell the attorneys of defendant, because said attorneys of defendant did not ask us.

Dr. T. C. Hood, first witness for the defendant, said, after being sworn as the law requires, I am a practicing physician, and was appointed by the court, with Dr. Diall, to examine the plaintiff, and we did examine plaintiff. After the adjournment of court Dr. Dial and myself went, at the request of the attorneys of plaintiff, to the law office of said attorneys, and told said attorneys the result of our examination. We examined the spine of plaintiff by
62 pressure, at once plaintiff would flinch under the pressure. We talked with plaintiff as to the history of his case, and the sym*n*toms that plaintiff had. My opinion is, that plaintiff has sym*n*toms of approaching paralysis. We discovered no evidence of injury on plaintiff's person, and do not know whether the giving away of the plaintiff under the pressure was real or not. My opinion is based upon what plaintiff said, and the sym*n*toms as detailed by the plaintiff. Numbness in the lower limbs and tin*k*ling of the muscles are sym*n*toms of approaching paralysis. An injury sufficient to produce paralysis would *e*ffect all the portions of the body below the seat of the injury. An injury of that kind to the spinal column would *e*ffect the urinary organs and the bowels, and would manifest itself within a year or two at farther*e*st as a general rule.

Paralysis generally comes on in an instant, and it usually begins at the time of the injury. A person injured on the spine sufficient to paralize would have no control of the bowels or of the urinary organs, and the general health would be impa-red, followed with loss of appetite, and lower limbs would waste away. We discovered no such indications upon the body of the plaintiff.

Cross-examined by plaintiff:

63 Serious injury of the lumbar vertebræ could exist without involving the bowels, the kidneys, the bladder, or the digestive organs, because the lumbar vertebræ is below the seat of the nerves which lead to those organs. I know of no way of ascertaining the extent of an injury to the spine without the aid of the patient in stating his symptoms, and the nature of the result. I am a graduate of the University of Louisiana.

Dr. J. H. POPE, witness for defendant, being duly sworn, testified as follows, viz:

I am a physician and surgeon, and am a graduate of the medical school of the University of Virginia. I have been practicing medicine since 1869. I remember hearing of the wreck on the Texas and Pacific Railway, in which plaintiff is alleged to have been injured. I went to see him the third day after he received the injury at the instance of the defendant. Dr. Vaughn accompanied me. I found plaintiff at home, lying in a reclining chair. I told him why I came. I examined his right hand, and found one of the bones of the little finger either broken or dislocated, I could not tell which, as it was very much swollen. I examined his back, and saw a considerable bruise on one side of the spine. The whole surface was discolored from the
64 bruise. From that examination, I believe that the plaintiff was not permanently injured, and that the muscels of the back were involved, but not the spine. My opinion was based upon the general appearance of the injury, and from there being no appearance or symptom of paralysis that I discovered. Had the spine been involved, in all probability total or partial paralysis would have set in within a few days after the injury. Since I examined plaintiff I have frequently noticed him walking on the streets. I noticed that he walked with a stick, and he walked slowly and took short steps. I have not observed any dragging of his feet, nor anything to indicate approaching paralysis. I still adhere to the opinion that I formed when I first examined him, and that is, that his injuries are not permanent. If my opinion, of the injury to plaintiff had been sufficient to permanently disable him, it would before this have terminated in paralysis. Injuries to and diseases of the spine never stand still; the patient either gets well, or he becomes paralyzed and dies. Had the injury been sufficient, paralysis would have followed soon after its infliction. Had the injury been sufficient to produce immediate paralysis, the plaintiff
65 would not have been able to get on the cars and ride sixteen miles to Waskom's, and ride home, a distance of six miles,

next morning on horseback. Such acts on the part of plaintiff would have a tendency to aggrevate his injury. Paralysis usually ensues in a few hours—always in a few months. If the injury to plaintiff had been sufficient to cause paralysis, it would, in my opinion, have reached its climax long ago. From the lapse of time since plaintiff's injury, I do not believe that paralysis will ever result therefrom. The spine is the most sensative and tender part of the human organization, except the brain, and injuries to the spinal cord seldom heal. The bony structure of the spinal column may be injured, dislocated or fractured, and the patient recover; but in such cases the spinal marrow escapes injury. I found the injury to plaintiff's back to be at the lumbar vertebræ. In paralysis of the lower part of the body, the patient is unable to control his urine or his bowels. The lower limbs will wither and the muscels waste away, and in two years the patient would ordinarily be totally disabled, if not dead. Surgeons can by a proper examination discover injuries to the spine. Electricity is the most reliable test. Cold or hot water is also a test. The sudden application of a
66 sponge saturated with cold or hot water to the injured part is used as a test; also pressure on the spine, noticing whether the patient flinches more in one place than another is a test, but the least reliable. Injuries to the spine sufficient to cause paralysis always affect the general health of the patient. Plaintiff's appearance is healthy and his color is good. By the use of scientific tests I could at this time ascertain to my own satisfaction whether the plaintiff's injuries are of such a nature as to result in paralysis. I observed the walk and movement of plaintiff for several reasons. In the first place, I had examined him and formed the opinion that his injuries were not permanent. I wanted to see if my opinion was correct. Then I was summonsed as a witness, and wanted to observe him, so as to be accurate in detailing my testimony. I have not observed any dragging of the heel.

Cross-examination:

There is no rule in medicine or surgery that is infallible. Cases sometimes develop themselves in such a manner as to upset all previous theory and experience upon the particular subject.

It is a general rule that when a man is shot through the head he will die, but there are well-authenticated cases to the con-
67 trary. I do not say that the plaintiff is not permanently injured, but that my opinion is, that he is not; some of the symptoms stated by him, particularly the dragging of his feet, would indicate a permanent and serious injury. The only examination of plaintiff made by me at his house, three days after he was hurt, was by looking at the place on his spine and by pressure. He flinched when I pressed on right side of lumbar region. I applied no other test. I found his back at that point much discolored, and appeared as if he had been struck by some hard substance. Cases are reported where paralysis has come on years after the injury, but such cases are rare. Sometimes a person will receive a severe spinal injury, and after some years, or shorter or longer time, will recover.

A blood clot might, on account of the injury, be resting upon the spinal marrow, and would be finally absorbed, and the patient be entirely restored. Fractures of the bones of the spine will sometimes occur, and cause serious injury, but not produce paralysis, and the patient may final-y recover. The lower lumbar region of the spine is not the seat of the nerves which lead to the kidneys, bladder, and bowels, and digestive organs, and a person might receive permanent injury of that portion of the spine and not
68 have the organs named injured or involved. The statements of the patient are of much service in diagnosing disease or effects of injury, and without them no infallible or certain tests exist. The books shown me, to wit, "Ashurest Surgery" and "Diseases of the Spine and Nerves," are high and standard medical authority. I was in the employ of defendant at time I went to see plaintiff, and I went at the instance of defendant. I am still in their employ.

W. H. ABLE, witness for defendant, said: I was conductor on the train on which plaintiff was injured. It was a very cold day. The wreck was a broken rail. Two cars were thrown off; one a freight car and the other the passenger coach. The broken rail was just east of a small bridge four miles west from Shreveport. I was in baggage car. My duty required me to be anywhere on the train my presence was necessary. The coach turned over about 50 feet west of the bridge. As soon as the train could be stopped I returned to the wrecked coach, and I saw plaintiff get out and walk upon the track. He complained of his hand at the time. As soon as we got the freight car on the track we put the passengers in the baggage car and came on to Marshall. If any one assisted plaintiff
69 to get on the baggage car I did not see it. I had cushions brought from the passenger car and fixed in the baggage car for plaintiff to lie on. Plaintiff lay on them all the way to Waskom's station, where he got off. The broken rail was on the east of the bridge, and the upturned west of the bridge. I did not go across the bridge and examine the cause of the accident, but saw the rail was broken and the cross-ties and track were badly broken. The ties were not new, but they were sound, and the road was good at that place. Two trains passed over the road daily, and we had passed on the train going to Shreveport only a few hours before. The broken rail was, to all appearances, sound. I cannot say what car broke the rail.

Cross-examined:

Witness ABLE testified: I never examined or inspected that part of the road. My reason for believing that the ties were sound was that I travelled over the road twice every day for two years, and no accident happened at that place. I never examined the cross-ties that day, and I do not really know whether they were sound or rotten. There were two brakemen on the train. The position of the rear brakeman was at the brakes of the rear car; that of
70 the front brakeman was on the top of the freight cars, any-

where within five cars from the front. I can't say where the front brakeman was at the time of the accident. The rear brakeman was on the baggage car. The front brakeman could not have stopped the train if he had been at his post of duty. The ties had been in the road two years. I had been running over them about that length of time. Do not know how much longer they had been there. I did not observe the print of car wheels on the bridge, but the coach must have crossed the bridge on the ties. None of the ties of the bridge were broken. I was passing through Marshall from a trip North to-day, and stopped over at the request of defendant. I have been employed by the construction company as timber inspector since quitting the service of defendant.

The defendant read in evidence, in its behalf, the depositions of S. G. KNOWLTON, taken on the 11th day of May, A. D. 1881, in which he testified as follows, to wit:

I reside in Marshall, and am a railroad contractor. I was, on the 10th day of February, A. D. 1879, in Shreveport, Louisana, as bridge superintendent of the Texas and Pacific Railway Company. I inspected, at the time above mentioned, the bridges of all of the road of the Texas and Pacific Railway Company. I remember an
71 accident to the passenger train on the 10th day of February, A. D. 1879, about three and a half miles from Shreveport. The accident was caused by a broken rail. The broken rail was an old one; do not know if it was strong; the cross-ties were good, as far as I recollect. I did not inspect the track; my business was to inspect the bridges; consequently cannot say what was the condition of the track where the said accident occurred. The weather was very cold the day the accident happened. I do not know what effect said cold spell had on the rails in the track, but extreme cold weather is liable to make iron brittle. I am an experienced railroad man, but not very scientific as to the effects of cold weather on iron. My experience is that it is more brittle in extreme cold weather. I was on the train in the baggage car at the time of the accident, and saw then the broken rail. The general condition of the road-bed at the place of accident was good. The broken rail was old; can't say if it was properly adjusted. I went over the track on the morning of the accident and found it in good condition, as far as I could see. The accident occur-ed near a bridge. I was over the track and inspected the bridge; the track was good, as far as my observation went; the broken rail was old.

72 To cross-interrogatories the witness deposed as follows, to wit:

I did not inspect the track. I rode over the road. I have before answered that the broken rail was old. I do not know how many new rails were in the track between Marshall and Shreveport on the 10th day of February, 1879. After said accident I went to the place where it occurred, and found the ties good, but the rail broken. I went to see what caused the accident. It occurred about 3½ miles from Shreveport, La. It was the north rail that broke; broke about 5 feet from end; only broken in one place; cannot give height of thermometer on day of accident. Do not know the degree

of cold necessary to make a rail brittle or liable to break. I know of no other rail being broken that day between Marshall and Shreveport; do not know how long the track had been laid down between Marshall and Shreveport. The iron was old and badly worn; do not know how many cross-ties had been laid down within six months before said accident on the line between Marshall and Shreveport. I worked for defendant over seven years. I am a railroad contractor at this time; have never studied the science of chemistry; never learned, except by experience, that the weather effected metals; have never read any books on the subject.

73 I do not know the degree of cold that will cause a rail to break. Nor do I understand the philosophy of the thing. I have not talked to any one in the last month about this case.

There is no one present except the notary and myself while I am answering the interrogatories. I am answering the interrogatories in the office of Lewis E. Carter, J. P. and notary public in the city of Shreveport, Caddo parish, Louisiana. No one has heard an interrogatory or answer but myself and the notary.

In this case the parties failed to agree to a statement of facts, and they each of them prepared and presented to me a statement of facts as understood by them respectively, and from these statements so presented to me, and from my own knowledge of the facts of the case, I have prepared the foregoing statement, and approve the same as a correct statement of all the facts given in evidence on the trial of this cause.

A. J. BOOTY,
Judge 2d Judicial Dist.

File: Filed July 11th, 1881. Alex. S. Field, clerk.

74 *Charge of the Court and Verdict. Filed 19th May*, 1881.

A. F. McALLISTER
vs.
THE TEXAS & PACIFIC RAILWAY CO. } 6833.

GENTLEMEN OF THE JURY:

This is a suit brought by the plaintiff against the defendant for damages for personal injuries received by him, as he alleges, while travelling as a passenger on the train of cars of the defendant.

The plaintiff charges that the injuries of which he complains were caused by the breaking of one of the iron rails on which the wheels of said cars travelled, and that the breaking of said iron rail was caused by the rotten condition of the cross-ties under and beneath said iron rail, and which were intended to support the said iron rail, and that thereby the coach in which the plaintiff was travelling was overturned and the plaintiff injured.

And plaintiff further charges that the injuries of which he complains, might have been prevented notwithstanding the breaking of said rail, if the defendant's brakeman had been at his place of duty and had used his brake.

75 The defendant denies these allegations of the plaintiff, alleges that the cross-ties alleged to be rotten were, in fact, sound and substantial, and of sufficient strength for the purposes for which they were intended, and that the breaking of said rail was caused by the extreme coldness of the weather, which rendered said iron rail brittle.

A railroad company is bound to lay its track and road-bed in such a manner and to keep them in such condition as to make the road safe for the use of its passengers, and to this end the iron rails on which its cars travel should be laid upon cross-ties that are good, sound, and substantial, and such as to make it safe for passengers to travel over its road. A railroad company is not an insurer of the safety of its passengers, but it is bound to provide for the safety of its passengers as far as human care and foresight will go.

The failure of a railroad company, therefore, to provide sound and substantial cross-ties upon its road is culpable negligence, for which any passenger injured by the failure to provide them is entitled to recover damages.

76 It is the duty of the railroad company, too, in the conduct and management of its trains, to employ skillful and competent break-men, and the duty of its brakemen to stay at their place of duty and perform their duties as brakeman, and any person injured while travelling as a passenger on its cars by reason of the failure of a brakeman to be at his post, or to properly do his duties, may recover damages for an injury so occasioned.

But if the brakeman of a railway train should not remain at his post of duty while the train is moving, yet if his failure to be at his post of duty was not the cause of any person being injured, then no recovery can be had merely because the brakeman was not at his place of duty.

Now, if you believe from the evidence in this case that the plaintiff, McAllister, was accepted as a passenger on the defendant's railroad, and paid fare, and that while travelling on said train from Shreveport, in the direction of Marshall, an iron rail upon said road was broken, and the coach in which said plaintiff was travelling was thereby overturned and the plaintiff thereby injured, and if you further believe from the evidence that the breaking of said iron rail was caused by the unsoundness or rottenness of

77 the *of the* cross-ties that were beneath said iron rail, then you will find [for] the plaintiff; or, if you believe from the evidence that at the time of the overthrowing of the coach in which the plaintiff was travelling, and by the overthrowing of which he was injured, if he was injured at all, the brakeman of said train was away from his post of duty, and by reason of his being away from his post of duty the plaintiff suffered injury, then you will find for the plaintiff.

You are further instructed that if you believe from the evidence that the breaking of the said rail was not caused by the unsoundness or rottenness of the cross-ties under the same, but that the cross-ties under the said rail were good, sound, and substantial, and capable of supporting the said iron rail with defendant's train of cars pass-

ing over it, and if you further believe from the evidence that the plaintiff was not injured by any neglect or failure of duty on the part of defendant's brakeman in being away from his post of duty, then you will find for the defendant.

You have been instructed that it is the duty of a railroad to provide for the safety of its passengers as far as human care
78 and foresight will go. But you are instructed that the expression, "as far as human care and foresight will go," does not mean that the railroad company is required to exercise all the care and diligence of which the human mind can conceive, or all the skill and ingenuity of which the human mind is capable.

This latter degree of care and diligence might, and in many instances would, require a degree of expense and impose a degree of responsibility that would drive all prudent men from the business of carrying passengers.

Such a degree of care as is last *last* mentioned would require steel rails, or iron in granite cross-ties, and the like, which are surely less likely to decay, and therefore in that respect at least safer than wooden ties. But the obligation of the railroad company to make provision for the safety and security of its passengers, as far as human care and foresight will enable them to do so, does require everything necessary to the security of the passengers, reasonably consistent with the business of the company and suitable to the means of conveyance used by the company.

You are the exclusive judges of the facts in evidence before
79 you, and of the weight and credit that are due to the testimony of the witnesses, including the testimony of the expert witnesses.

If you think there is conflict in the testimony of the witnesses, it will be your duty, if you can do so, to so reconcile the conflict as to give credit to the whole of the testimony; but if you are unable to do this, then you may credit or discredit the whole or any part of the testimony of any witness who has testified in the cause, according as your minds may be impressed, that his testimony is or is not worthy of belief.

The plaintiff, by the allegations in his petition, bases his right to recover upon the rottenness or unsoundness of the cross-ties which were under the broken rail, and upon the failure of duty on the part of the brakeman of said train, and the plaintiff must recover, if at all, upon one or the other or both the grounds last above mentioned; and if neither of these causes exist, that is, if neither of these grounds has been established by the evidence, then the plaintiff cannot recover, even though by the testimony that the defendant was guilty at the time of the occurrence of the acts of negligence than those alleged in his petition.

If you find for the plaintiff, you will find for him the value
80 of the time lost by the plaintiff during the period necessary for his cure, and while disabled from his injuries to work and labor, taking into consideration the nature of his business and the value of his services in conducting the same, and also fair compensation for the mental and physical suffering caused by the injury.

And if you are convinced by the evidence that the plaintiff has been personally injured by the overturning of the said coach in which he was travelling, then you will also find for him your estimate of the amount in which he has been damaged by the probable effect of the said injury in future upon his health and the use of his limbs and his ability to labor and attend to his affairs, and generally any reduction of his power and capacity to earn money and persue the course of life which he might otherwise have done.

In considering this case, you should not consider either the wealth or the poverty of either the plaintiff or the defendant.

If you should find for the defendant, you will simply say so.

If you find for the plaintiff, you will render a verdict in the following form:

81 We, the jury, find for the plaintiff —— dollars, filling the blank with the amount found by you, and you are instructed that you can in no event find for the plaintiff a greater sum than the amount claimed by him in his petition.

A. J. BOOTY, *Judge.*

File: Filed 18th May, 1881. A. S. Field, clerk.

We, the jury, find for the plaintiff ($8,000.00) eight thousand dollars.

May 19th, 1881. F. B. TIMMONS, *Foreman.*

File: Filed May 19th, 1881. Alex. S. Field, dis't clerk.

Rejected Charges. Filed May 18th, 1881.

District Court, Harrison County. Spring Term, 1881.

A. F. McALLISTER
vs.
T. & P. RAILWAY CO. } 6833.

1. The petition charges that the defendant negligently was the cause of the injury, and that the negligence consisted in having insecure and rotten ties in the road at the *at the* point of the

82 accident; and that these ties gave way, causing one of the iron rails to break, and that the broken rail threw the car off the track, by which he was injured. You are charged that the plaintiff can only recover on proof of the allegations of his petition, and unless the evidence shows that the ties under the rail were rotten, and that they gave way, causing the iron rail to break, and that the broken rail threw the cars off the track, he cannot recover, and you will find for the defendant.

No. 2. The defendant is entitled to be tried by the same rules as individuals, and the jury should not take into consideration either the wealth of the defendant or poverty of the plaintiff.

If the facts would not authorize a jury in giving a verdict against an individual, neither would they authorize a verdict against a corporation, unless the defendant was guilty of the acts of negligence charged in the petition, the verdict should be for the defendant.

3d. One or more of the brakemen being out of their place on the train would not render the defendant liable unless their being out of place caused the rail to break and car to be overturned.

83 As there was no evidence showing that the position of the brakemen caused the accident, the jury are charged not to consider the position of the brakemen in determining the question of negligence.

4. the plaintiff charges that the brakemen on the train were not in position, and had they been in proper position the accident would not have happened, but as no proof was offered tending to show that the position of the brakemen had anything to do with plaintiff's injury, the jury are charged not to consider the position of the brakemen in making up their verdict.

5th. Unless the ties were rotten, as charged in the petition, and unless that condition of the ties caused the rail to break and overturn the cars and injure the plaintiff, he cannot recover. The plaintiff must prove the allegations of his petition, or he cannot recover. Proof of other acts of negligence than the acts charged, even if the plaintiff were injured thereby, will not entitle him to a verdict.

In this case, as in all others, the proof must sustain the allegations, or the verdict must be for the defendant.

A. F. McAllister *vs.* T. & P. Railway Co.

84 6. The act complained of is shown to have been within the State of Louisiana. In order for the plaintiff to recover in this case he must show that, by the laws of this State, he is entitled to recover damage for such an injury, unless, then, the evidence shows that the law of that State authorizes a recovery of damages for the alleged injury, you will find for defendant.

A. F. McAllister *vs.* T. and P. Railway Company.

7. If you believe from the evidence that even if the brakeman had been at his post, and could not have in any way averted the accident complained of, then you are not to consider his absence from his post as the negligence of the company, and you can, in no event, consider it unless the said absence on his post has been established by proof.

8. If you believe from the evidence that the breaking of the iron rail, as alleged, was caused by the extreme cold weather or by any cause over which the defendant had no control, and not in any way by the negligence of defendant, then you will find for the defendant.

9. You are instructed that the burden of proof is upon the

85 plaintiff in this case, and that before he can recover herein he must establish, to the satisfaction of your minds the material facts alleged in his petition by a clear preponderance of the testimony.

10. If you believe from the evidence that this accident occurred in the State of Louisiana, before the plaintiff can recover he must establish by proof that under the laws of Louisiana he is entitled to

recover damages upon the facts alleged in his petition; and unless you find that the laws of Louisiana authorize a recovery upon such a state of facts, then find for defendant.

TURNER & STUART,
Att'ys for Defendant.

The above instructions were asked by the defendant on the trial of this cause, and refused by the court, and the clerk of the court will file the same as part of the record in this cause.

A. J. BOOTY, *Judge.*

File: Filed May 18th, 1881. Alex. S. Feild, clerk. By J. B. Lewis, dep'y.

Judgment.

A. F. McALLISTER *vs.* TEXAS AND PACIFIC R'Y CO.

86 Be it remembered that on this the 19th day of May, A. D. 1881, came the said plaintiff, A. F. McAllister, in person, and by his attorneys, and announced ready for trial, and the said defendant, the Texas & Pacific Railway Company, came, by its attorneys, and announced not ready for trial; and the motion of said defendant for continuance coming on to be heard, the court *the court* overruled said motion, and the defendant excepted, and the exceptions of the said plaintiff to the trial, amendment, and plea in abatement of said defendant coming on to be heard, the court sustained said exceptions; to which defendant excepted. Thereupon came a jury of good and lawful men, to wit, T. B. Timmons, foreman, and eleven others, who were duly drawn, empanneled, and sworn according to law, who, after hearing the evidence, the argument of counsel, and having received the charge of the court, retired to consider of their verdict, and who afterwards returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff ($8,000) eight thousand dollars.

"May 19th, 1881. T. B. TIMMONS, *Foreman.*"

It is, therefore, considered by the court that the plaintiff, A. F. McAllister, do have and recover of the said defendant, The
87 Texas and Pacific Railway Company, the said sum of eight thousand dollars, the finding of the jury aforesaid, together with all the cost in this behalf incurred, for all of which let execution issue; and it is further considered by the court that the defendant, for the use of the officers of court, do have and recover of the plaintiff all of the costs in this behalf incurred by the said plaintiff, for which let execution issue.

Motion for New Trial. Filed May 21st, 1881.

District Court, Harrison Co., Texas. Spring Term, 1881.

A. F. McALLISTER *vs.* TEXAS AND PACIFIC RAILWAY COMPANY.

Now comes the Texas and Pacific Railway Company, defendant in the entitled cause, and moves the court to grant it a new trial in said cause for the following reasons, to wit:

1st. Because the verdict is contrary to the law and the evidence.
2d. Because the verdict is grossly excessive and unjust in amount.
3d. Because the verdict is contrary to the charge of the court in this cause.

88 4th. Because the charge of the court is contrary to law.

5th. Because the court erred in its charge to the jury in the following particulars, to wit:

1st. Because the court instructed the jury as a matter of law that where a person is injured upon a railroad by reason of the unsoundness of cross-ties upon said road, that it is such negligence on the part of the company as will entitle the person to recover damages.

2d. Because the court instructed the jury that if the injury complained of in this case was caused by the absence of the brakeman from his post of duty, then the plaintiff could recover, because the court is assuming and deciding what facts constitute negligence.

3d. Because the court instructed the jury that the failure of a railroad company to provide sound and substantial cross-ties upon its road is culpable negligence, for which any passenger injured by the failure to provide them is entitled to recover damages, because the same is making negligence a question of law.

89 4th. Because the court refused to instruct the jury that the defendant in this case would not be liable if the accident complained of was caused by any agency over which the defendant had, nor could have had, no control, and thus erred in not giving the 8th special charge asked by defendant.

6th. Because the court erred in refusing any and all of the special charges asked by defendant.

7th. Because the court erred in giving any instructions as to the brakeman upon the train being absent, &c., because there was no proof to support it.

TURNER & STUART,
Att'ys for Defendant.

File: Filed May 21st, 1881. Alex. S. Feild, district clerk, Harrison Co. By J. B. Lewis, dep'y.

Order Overruling Motion for a New Trial.

A. F. McALLISTER
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 6833.

On this the 28th day of May, 1881, came the defendant, by attor-

neys, and also came the plaintiff, by attorneys, and the mo-
90 tion of the defendant for a new trial in this cause coming on to be heard, both parties announced themselves ready for trial. Thereupon the court proceeded to hear said motion for a new trial, and the court, after hearing the argument of counsel, and being fully advised in relation thereto, doth order and consider that said motion for a new trial of the said defendant be, and the same is hereby, in all things overruled.

To which ruling of the court the defendant excepts, and in open court gives notice of appeal to the supreme court of the State of Texas.

1st Bill of Exceptions. Filed July 11th, 1881.

A. F. McALLISTER *vs.* T. & P. R'W'Y COMPANY.

1st. Be it remembered that on the trial of this cause the following proceedings were had:

Defendant filed his motion and bond to remove this cause to the honorable circuit court for the eastern district of Texas, and his honor the district judge approved the bond as sufficient in amount and as to sureties, and, on hearing, overruled the motion, and refused to make the order removing said cause.

To which ruling the defendant excepted, and tenders this bill of exceptions.

91 2nd. And the defendant filed his plea in abatement, that the plaintiff had made his appearance at the hon. United States circuit court at Jefferson, and did prosecute this suit against the defendant.

Def't Plea in Abatement. Filed May 2d, 1881.

A. F. McALLISTER *vs.* TEXAS AND PACIFIC RAILWAY CO.

And now comes the defendant, and exceptions having been sustained to the amended original answer of defendant, by leave of the court, amends and says:

That said plaintiff ought not to further maintain and prosecute this suit in this court, because it says that the defendant filed in the U. S. circuit court at Jefferson, in the eastern district of Texas, a certified copy of the record of the pleadings and other papers in this cause, and had the same entered upon the docket of said court, all of which was done at the fall term, 1879, of said court, and the said cause thereafter and now is pending in said court.

And at the fall term, 1879, of said court the said plaintiff did make his appearance at said term of the U. S. court at Jefferson, and entered an appearance therein, and filed and argued a motion to remand said cause to this court, which motion was overruled,
92 and said U. S. circuit court decided that said cause was properly removed to said court, and refused to remand said cause, and entertained jurisdiction thereof; and the said plaintiff, then appearing further in said cause, argued that the same be continued to the spring term, 1880, of said court; and at the spring term, 1880,

plaintiff forced the defendant to continue said cause; and at the fall term, 1880, the plaintiff again appeared before said court and prosecuted his said cause, and consented to a continuance thereof; and at the spring term, 1881, of said court said plaintiff again prosecuted said cause in the said U. S. circuit court at Jefferson, and did continue said cause; and in view of the foregoing matters and things, the defendant says that said plaintiff should not be permitted further to prosecute said cause in this court, and that the same be abated and stricken from the docket of this court.

TURNER & STUART,
Att'ys for Def't.

THE STATE OF TEXAS, *Harrison County:*

I, James Turner, attorney for and authorized to represent defendant in this behalf, do swear that the matters stated in the
93 foregoing plea are true.

JAMES TURNER.

Subscribed and sworn to before me, this the 2d day of May, 1881.

A. S. FEILD,
Clerk Dist. Court of Harrison Co., Texas.
By J. B. LEWIS, *Dep'y.*

File: Filed 2d May, 1881. A. S. Feild, clerk dist. court Harrison county, Texas. By J. B. Lewis, dep'y.

And the plaintiff filed exceptions to said plea.

Pl'ff's 1st Sup. Petition. Filed 13th Nov., 1879.

In District Court of Harrison County. Fall Term, A. D. 1879.

A. F. MCALLISTER *vs.* TEXAS & PACIFIC R'W'Y CO.

And now comes the plaintiff and, by leave of the court, files this his 1st supplemental petition replying to 1st amended answer of defendant, filed herein on the 13th day of November, 1879, and says that said answer is not sufficient in law, and does not set up any defence to this suit, and plaintiff specially excepts to that part of said answer which alleges that the plaintiff is prosecuting this suit in the U. S. court, because the same is a plea in abatement and is not sworn to, and also to that part of said answer which
94 charges that the broken rail was caused by extreme cold weather, because the same fails to show that defendant could not have prevented or avoided said accident by the exercise of the utmost prudence and care. And because the said answer does not show that the weather was so cold as to be unprecedented, and because the fact that if said weather caused the iron rails to become brittle and liable to break, the same, instead of being an excuse, shows negligence on the part of the defendant.

And plaintiff, further replying to said amended answer, says that this cause was not instituted by the plaintiff in the U. S. court, but was removed there by defendant against the wish of plaintiff, and

after the defendant's motion to remove same had been overruled by this court.

N. A. STEDMAN,
POPE & POPE AND HILL,
Att'ys for Pl'ff.

File: Filed 13th Nov., 1879. J. L. Garrison, clerk.

And, on hearing, the court sustained the exceptions and struck said plea from the record; to which ruling the defendant excepted, and tenders this bill of exceptions.

95 2d. During the trial W. H. Dial was examined as a witness, and stated that he examined plaintiff's person, but found no evidence of injury thereon; that on pressing on a certain part of his spine the plaintiff appeared to shrink. He further stated that he inquired of plaintiff as to his symptoms and the history and nature of his injuries, and that he formed his opinion from what the plaintiff told him of his case. He was then asked what was his opinion as to the extent and permanency of plaintiff's injury. To this the defendant objected, because the opinion would be heresay, because Dial had disclosed the fact that his opinion was entirely based on the statements of plaintiff, and it would be, in effect, the plaintiff deciding the case in his own favour. The court overruled the objection, and the defendant excepted, and tenders this bill of exceptions.

TURNER & STUART,
Att'ys for Def't.

Approved:
A. J. BOOTY,
Judge 2d Judicial District.

File: Filed July 11th, 1881. Alex. S. Feild, clerk.

96 *Assignment of Errors. Filed July 8th*, 1881.

District Court, Harrison County. Spring Term, 1881.

A. F. MCALLISTER *vs.* T. & P. RAILWAY CO.

And comes The Texas and Pacific Railway Company, defendant in the above-entitled cause, and assigns the following errors, committed by the district court of Harrison county on the trial of the above cause:

1st. The court erred in refusing to remove this cause to the hon. U. S. circuit court, upon filing of petition and bond by defendant, as required by law.

2d. The court erred in sustaining plaintiff's exceptions to defendant's plea in abatement, filed at spring term, 1881, of said court, to the effect that this cause was pending in the honorable U. S. circuit court, at Jefferson, Texas, and that said plaintiff had entered his appearance there, and was prosecuting said cause against defendant.

3d. The court erred in refusing to appoint a surgeon named by

defendant to examine the person of plaintiff, in order to ascertain the full and true effect and condition of plaintiff's alleged injuries.

97 4th. The court erred in permitting W. H. Dial to give his opinion as to the permanent character of plaintiff's injuries, Dial having already testified that he found no evidence of injury on McAllister's person, and that his opinion was based entirely upon what McAllister told him of his injuries.

5th. The court erred in not giving all the several special charges asked by defendant.

6th. The court erred in its charge to the jury, as follows:

1st. Because the court instructed the jury, as a matter of law, that where a person is injured upon a railroad by reason of the unsoundness of the cross-ties upon such road that it is such negligence on the part of the railroad company as will entitle the injured person to recover damages.

2d. Because the court instructed the jury, as matter of law, that if the injury complained of in this case was caused by the absence of the brakeman from his post, then the plaintiff could recover.

(3.) Because the court instructed the jury that the failure on the part of a railroad company to provide sound and sub-

98 stantial cross-ties upon its road is culpable negligence, for which any passenger by such failure to provide them, is entitled to recover, because the same is making negligence a question of law.

(7.) The court erred in overruling defendant's motion for a new trial, for the several reasons therein stated.

(8.) The court erred in overruling defendant's motion for continuance.

TURNER & STUART,
Att'ys for Def't.

File: Filed with the appeal bond, this July 8th, 1881. Alex. S. Feild, clerk.

Appeal Bond. Filed 8th July, 1881.

THE STATE OF TEXAS, *Harrison County:*

Judgment in District Court, at Spring Term, 1881.

A. F. MCALLISTER
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY.

Know all men by these presents, that the Texas and Pacific

99 Railway Company, as principal sureties, are held and firmly bound to pay A. F. McAllister in the sum of ($17,500) seventeen thousand five hundred dollars, for the payment of which, well and truly to be made, we, and each of us, bind ourselves jointly and severally and firmly by these presents. This bond is so conditioned however, that whereas, on the 10th day of May, 1881, it being a

regular day of the spring term of the honorable district court of the county of Harrison and State of Texas, A. F. McAllister recovered a judgment in said court for the sum of ($8,000) eight thousand dollars, and all costs of suit against the said defendant; and whereas the defendant filed its motion for a new trial in said cause, and the same coming on to be heard in said court on the 28th day of May, 1881, and, on hearing, the court overruled said motion, and denied the new trial prayed for in said motion, to which ruling of the court the said defendant then and there and in the open court excepted, and gave notice in open court of appeal to the honorable supreme court of Texas. Now, if the said Texas and Pacific Railway Company, appellant, shall prosecute its appeal with effect, and in case the judgment of the supreme court shall be against said Texas and Pacific Railway Company, appellant, that it shall perform its judgment sentence or decree, and pay all such damages as said
100 court may award against it, then and in that case this bond shall be of no further validity, but otherwise to be and remain in full force and effect.

In testimony whereof, the said Texas and Pacific Railway Company has signed this bond by its attorneys for that purpose duly authorized and empowered, and each of said sureties have also signed their names hereto on this the — day of July, A. D. 1881.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By JAMES TURNER, *Its Attorney.*
L. KAHN.
A. KAHN.
JAS. H. CARTER.

Approved, this July 8th, 1881.
ALEX. S. FEILD, *Clerk Dist. Ct., H. Co., Texas.*

File: Filed with the assignment of errors, this July 8th, 1881. Alex. S. Feild, clerk.

Cost Bill.

To fil. doc. & tax cost. .60; cop. pet., 2.25; 2 cit., 1.50	$4 35
fil. ans., pet., & bond, .45; approv. bond, 1.50	1 95
fil. except., .15; ord. court, .75; contin., .20; trans. to U. S. ct., 7.50	8 60
int. & cross, .30; copy int., 1.50; precept, 1.50; Rhods-	2 80
cop. int. & X to Rhodes, 2.00; com., 75; cont., .20	2 95
fil. int. & X to Rhodes, .30; cop. int., 1.50; precept, 1.00	2 80
To cop. int. & X 1.50; com., .75; fil. dep., 2 sets, .30	2 55
101 To subp., .45; ord. file am'd ans., .75; fil. 4 papers, .60	1 80
Subpœnas, 1.45; cont., .20; ord. file am'd orig. pet., .75	2 40
Ord. file 1st sup. pet., .75; file same, .15; 2 subpœ., .95	1 85
To clerk Garrison	$32 05

Am't over	$32 05
To sheriff Perry—cit. & mil., 1.60; 2 precepts, 2.00	3 60
2 subpœnas, 8.50; pl'ff subpœnas def't, 10.50	19 00
Spring term, 1881—ord. to file am'd orig. pet., .75; fil., .15	90
Fil. int. & X to Knowlton, .30; copy, 2.50; com., .75; fil. dep., .15	3 70
Fil. & doc. mo. for examination, .30; order on same, .75; fil. trial am'd., .75	1 80
Order on same, .75; fil. pl'ff's mo. in reply, .30; mo. cont., .15	1 20
Ord. overrul. mo., 75c.; aff'd'v't & seal, .50; fil. contin. af'd. & seal, .65	1 90
Fil. 2 charges, .30; emp. jury & rec. verdict, .70; fil. & doc. mo., .30	1 30
Order overrul. mo. new trial, .75; 11 subpœ., .33; wit., 6.05	6 80
Aff'd'v't Stuart, .50; McAllister, .50; Turner, .25	1 25
Judgment, .75; fil. ass'm't errors, .15; fil. ap. bond, 1.65	2 55
Fil. bill excep., .15; fil. stat. facts, .15	30
Transcript	60 00
Sheriff Perry, exec't. 11 subpœ.	23 05
	$159 40

THE STATE OF TEXAS, *Harrison County:*

I, Alex. S. Feild, clerk of the district court of Harrison county, Texas, do hereby certify that the foregoing one hundred and twenty-seven pages contains a true copy of all the proceedings in the cause of A. F. McAllister *v.* The Texas and Pacific Railway Company, No. 6833, in said district court.

102 In testimony whereof, I hereto sign my name and affix the seal of said district court, at office, in the city of Marshall, in said Harrison county, Texas, this —— day of October, A. D. 1881.

[SEAL.] ALEX. S. FEILD,
Clerk of the District Court of Harrison Co., Texas.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing one hundred and one pages contain a true and correct copy of the original transcript now on file in my office.

Witness my hand and the seal of said court, this the 20th day of August, 1883.

[SEAL.] CHAS. S. MORSE, *Clerk, &c.*

103 *Orders in Supreme Court.*

TEXAS & PACIFIC RAILWAY *vs.* A. F. MCALLISTER.

1881, Nov. 17. Set for 28th inst. Reset for Dec. 5th.

1881, Dec. 6. Submitted on briefs and oral arguments of both parties.

Dec. 23. Continued.

1882, Dec. 21. Taken under advisement and transferred to Galveston.

1883, Feb. 24. By agreement of parties, submission of this cause set aside and re-argument ordered.

1883, Feb. 27. Set for hearing March 15.

1883, Mar. 15. Submitted on briefs and oral arguments of both parties.

1883, March 30. Taken under advisement and transferred to Austin.

1883, May 1. Affirmed.

Judgment.

From Harrison Co. Opinion Delivered by Chief Justice Willie.

THE TEXAS AND PACIFIC RAILWAY CO. *vs.* A. F. McALLISTER.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is therefore considered, adjudged, and ordered that the judgment of the court below be in all things affirmed: that the appellee, A. F. McAllister, do have and recover of the appellant, The Texas and Pacific Railway Company, and its sureties, L. Kahn and James H. Carter, the amount adjudged below, together with all costs in this behalf expended, and this decision be certified below for observance.

104 *Petition for Writ of Error.*

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant,
vs.
ALEXANDER F. McALLISTER, Appellee.

To the honorable the chief justice of the supreme court of the State of Texas:

Now comes the Texas and Pacific Railway Company, not a banking, but a railroad corporation, incorporated by virtue of certain acts of Congress of the United States, viz., "An act to incorporate the Texas and Pacific Railway Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and an act supplimentary thereto, approved May 2, 1872, by Maxey and Fisher, its attorneys, and complains, that in the record and proceedings, and also in the rendition of a judgment, in a suit between Alexander F. McAllister, plaintiff, and The Texas and Pacific Railway Company, defendant, in the supreme court of the State of Texas, on appeal from the district court of Harrison county, in said State, said supreme court being the highest court of law or equity of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against The Texas and Pacific Railway Company on the 1st day of May, A. D. 1883, in said suit, wherein there was drawn in question the construction of certain statutes of the United States authorizing the removal of

105 suits begun in a State court to the proper circuit court of the United States, and the said judgment and decision were against the rights and privileges specially set up and claimed under such statutes by petitioner, all of which appears in the record and proceedings in said suit, herewith presented for your honor's inspection, manifest error hath happened, to the great damage and injury of the Texas and Pacific Railway Company.

Wherefore it prays for an allowance of a writ of error in said cause from the Supreme Court of the United States to the said supreme court of the State of Texas, and for such other process as may cause said judgment and decision to be corrected by the Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
By MAXEY AND FISHER, *Its Attorneys.*

The prayer of the petition is granted.
May 9th, 1883.

A. H. WILLIE,
Chief Justice Supreme Court of Texas.

Endorsement: The Texas and Pacific Railway Company *vs.* Alexander F. McAllister. Petition for writ of error. Filed in supreme court of Texas, at Austin, May 9th, 1883. Chas. S. Morse, clerk, &c.

106 UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the supreme court of the State of Texas, Greeting:

Because, in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of Texas, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between The Texas and Pacific Railway Company, plaintiff in error, and Alexander F. McAllister, defendant in error, wherein was drawn in question the construction of certain statutes of the United States, and the decision of said supreme court of Texas was against the rights and privileges specially set up and claimed under such statutes by the Texas and Pacific Railway Company, a manifest error hath happened, to the great damage of the said Texas and Pacific Railway Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command, if judgment be therein given, that then, under your seal, distinctly and openly, you send the
107 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

Supreme Court of the United States, the 9th day of May, A. D. 1883.

[SEAL.]

M. HOPKINS,
Clerk of the Circuit Court of the United States
for the Western District of Texas.
By SAM. HOPKINS,
Deputy Clk.

Allowed, this 9th day of May, A. D. 1883.

A. H. WILLIE,
Chief Justice of the Supreme Court of Texas.

Endorsed: The Texas and Pacific Railway Company, plaintiff in error, *v.* Alexander F. M. Allister, defendant in error. Writ of error. Filed in supreme court of Texas, at Austin, May 9, 1883. Chas. S. Morse, clerk, &c. M. & F.

108 CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, do hereby certify that on the day of the issuance of the writ of error a copy thereof was lodged in my office for the defendant in error, and that said copy is now on file in this office.

Witness my hand and the seal of the said supreme court, at the city of Austin, this the 20th day of August, A. D. 1883.

[SEAL.] CHAS. S. MORSE, *Clerk, &c.*

109 The United States of America to Alexander F. McAl-ister, or his attorneys of record, G. L. Hill, N. A. Stedman, and Alexander Pope, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of Texas, wherein The Texas and Pacific Railway Company is plaintiff in error and you, Alexander F. McAllister, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Asa H. Willie, chief justice of the supreme court of Texas, this 9th day of May, 1883.

[SEAL.]

A. H. WILLIE,
Chief Justice of the Supreme Court of Texas.

Endorsed: The Texas and Pacific Railway Company, plaintiff in error, *v.* Alexander F. McAllister, defendant in error. Citation. Filed in supreme court, at Austin, Texas, May 9, 1883. Chas. S. Morse, clerk, &c. M. & F.

110 TEXAS AND PACIFIC RAILWAY COMPANY
v.
A. F. MCALLISTER

STATE OF TEXAS, *County of Harrison:*

Before me, a notary public within and for the county of Harrison, State aforesaid, on this 25th day of August, 1883, personally came and appeared S. T. Scott, well known to me, who, being by me first duly sworn, upon oath says that on the 25th day of August, 1883, in Marshall, Harrison county, Texas, he, the said S. T. Scott, delivered to Alexander Pope, an attorney of record of A. F. McAllister, defendant in error in the cause stated in the caption hereof, in person, a true copy of the original citation, which is hereto annexed.

S. T. SCOTT.

Sworn to and subscribed before me, this 25th day of August, A. D. 1883, by the said S. T. Scott.

[SEAL.] C. H. McGILL,
Notary Public.

111 *Writ of Error Bond.*

In the Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
v.
ALEXANDER F. MCALLISTER, Defendant in Error.

Know all men by these presents, that we, The Texas and Pacific Railway Company, as principals, and James Turner and W. P. Hudgins, of the county of Harrison and State of Texas, as sureties, are held and firmly bound unto Alexander F. McAllister, in the sum of sixteen thousand dollars, to be paid to the said Alexander F. McAllister, his successors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, successors, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 7 day of May, A. D. 1883.

Whereas the above named, The Texas & Pacific Railway Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of Texas in a certain cause wherein the Texas & Pacific Railway Company was appellant and the said Alexander F. McAllister was appellee, on appeal from the district court of Harrison county, State of Texas, and wherein the said Alexander F. McAllister recovered a judgment against The Texas and Pacific Railway Company, for the sum of eight thousand dollars, and all costs of suit, which said judgment was, on appeal, affirmed by said supreme court of Texas.

112 Now, therefore, the condition of this obligation is such, that if the above-named, The Texas and Pacific Railway Company, shall prosecute its said writ of error to effect, and answer all

damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

TEXAS & PACIFIC RAILWAY COMPANY,
Per J. TURNER, *Att'y & Agent.*
JAMES TURNER.
W. P. HUDGINS.

Sealed and delivered in the presence of—
ALEX. POPE.
JAS. W. POPE.

Approved, 9th day of May, A. D. 1883, by—
A. H. WILLIE,
Chief Justice of the Supreme Court of Texas.

UNITED STATES OF AMERICA, 2 *District of Texas:*

James Turner and W. P. Hudgins, being duly sworn, depose and say, and each for himself saith, that he is worth the sum of eight thousand dollars, over and above all his just debts and liabilities, and exclusive of property exempt by law from execution or forced sale.

JAMES TURNER.
W. P. HUDGINS.

Severally subscribed and sworn to before me, this 7th day of May, A. D. 1883, by the above named James Turner and W. P. Hudgins.

In testimony whereof, I have hereunto set my hand and seal of office, this 7th day of May, A. D. 1883.

[SEAL.]
C. H. McGILL,
Notary Public of Harrison County, Texas.

113 THE STATE OF TEXAS, *County of Harrison:*

I, ———, clerk of the district court in and for the county and State aforesaid, do hereby certify that the above and foregoing writ of error bond is a good and sufficient bond, and if presented to me for approval in a cause pending in this court, would by me be approved.

Witness my hand and the seal of the said district court, this — day of May, A. D. 1883.

[SEAL]
ALEX. S. FIELD,
Clerk, D. C., H. Co., Texas.

I, A. Pope, attorney for A. F. McAllister, def't in error, agree that the above is a good and sufficient bond.

A. POPE,
Att'y of Record for A. F. McAllister, Def't in Error.

Endorsed: "The Texas & Pacific Railway Company *v.* A. F. McAllister." "Writ of error bond." Filed in supreme court of Texas, at Austin, May 9, 1883. Chas. S. Morse, clerk, &c. M. & F.

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing two pages contain a

true and correct copy of the original writ of error bond in the case of Texas and Pacific Railway Company, plaintiff in error, *vs.* A. F. McAllister, defendant in error, now on file in this office.

Witness my hand and the seal of said court, this the 29th day of August, A. D. 1883.

[SEAL.] CHAS. S. MORSE, *Clerk, &c.*

114 THE STATE OF TEXAS, *County of Travis:*

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, do hereby certify that the foregoing one hundred and thirteen pages contain a full, true, and complete copy of the record filed in said supreme court, at Austin, in the case of Texas and Pacific Railway Company against A. F. McAllister, No. 4807, and of all proceedings had therein, and also of the petition for a writ of error and the bond given therein. Further, I do hereby certify that I have attached hereto the original writ of error and the citation, with endorsements thereon and the service of the citation, copies of said writs and endorsements remaining on file in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, this the 20th day of August, A. D. 1883.

[SEAL.] CHAS. S. MORSE, *Clerk, &c.*

115 *Opinion.*

THE TEXAS AND PACIFIC R'W'Y CO., Appellant, *vs.* A. F. MCALLISTER, Appellee. } Appeal from Harrison County.

This action was brought to recover damages for injuries alleged to have been received by appellant whilst a passenger upon the cars of the Texas and Pacific Railway Company, caused by the unsound condition of the track over which said cars were being transported at the time, and the gross carelessness of the employees of the company.

The appellant pleaded a general demurrer, general denial, and specially that the road was in good condition; its employees skillful and competent; and that the accident was caused by the action of cold weather upon the iron rails, such as no human foresight could anticipate or prevent.

It also pleaded in abatement, that at the time of trial of the cause in the district court of Harrison county the same suit was pending in the U. S. court at Jefferson, Texas, which last plea was overruled and stricken out.

Something over a year after the commencement of this suit appellant filed its petition in the court below to remove the cause to the circuit court of the United States for the eastern district of Texas, which application was overruled, and the cause proceeded to trial, and resulted in a verdict and judgment for appellee for $8,000, from which the railway company have appealed to this court.

The first assignment of error brings in question the ruling of the

court below, refusing to remove this cause to the U. S. circuit court on application of the appellant.

The petition for removal is based on article 640 of the Revised Statutes of the United States, which reads as follows:

"Any suit commenced in any court other than a circuit or district court of the United States against any corporation other than a banking corporation organized under a law of the United States, or against any member thereof as such member, for any al-
116 leged liability of such corporation, or of such member, as a member thereof, may be removed for trial in the circuit court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or of any treaty or law of the United States, such removal in all other respects shall be governed by the provisions of the preceding section."

The application stated that the appellant was not a banking but a railroad corporation, incorporated by virtue of certain acts of Congress of the United States, viz: An act entitled "An act to incorporate the Texas and Pacific Railway Company, and to aid in the construction of its road and for other purposes," approved March 3, 1871, and an act supplementary thereto, approved May 2, 1872. It further stated that the company had a defence to the said action arising under and by virtue of a law of the United States, viz, "The said act of incorporation." This petition was not verified by oath, but was accompanied by a sufficient bond conditioned in terms of the law.

The application for removal was refused by the court, and we are asked by appellant to revise its action in this respect.

By reference to the section of the Revised Statutes cited above, it will be seen that the right to removal under that section depends upon two facts, which must be brought to the notice of the court in the application.

1. That a federal corporation, other than one for banking purposes, or some member of it, must be a party defendant to the suit; and

2. Such defendant must have a defence arising under or by virtue of the Constitution, or of some treaty or law of the United States.

A third requisite, applying more particularly to the manner in which the last-mentioned fact should be made known to the court, is, that the petition shall be verified by oath, at least as to the character of the defence, by reason of which it is sought to remove the cause.

As the petition in this case states in general terms the two facts upon which a removal may be had under the above section, it becomes necessary to inquire whether such a general statement as to the nature of the defence is sufficient. Preliminary to a consideration of the sufficiency of the petition in this respect, is the question of whether or not the judge below had the power to inquire
117 into such sufficiency, and refuse the application if, in his opinion, it did not come up to the requisites of the law.

It is contended by appellant that no such power exists in the

State court, and we are referred among other authorities to the 639 section of the U. S. Revised Statutes to sustain this position. It is there said in substance that at the time of filing the petition for removal the party applying must offer in the State court good and sufficient surety for the performance of certain acts; and that it shall thereupon be the duty of the State court to accept the surety and proceed no further in the cause against the petitioner.

If this point or any other made by appellant had been passed upon authoritatively by the Supreme Court of the U. S., we should consider it decisive of the question and follow it without discussion. The law under consideration is an act of the National Legislature governing the procedure of courts in which it may be administered, and from a decision of this court against a party claiming a right under it, a writ of error lies to that court, and its decision would govern us in its construction.

But we are referred to no case in which the exact position taken by the appellant has been endorsed by that court. The cases relied on in the brief of counsel hold that when a *sufficient* petition has been filed, it is the duty of the State court to proceed no further in the cause; its jurisdiction has closed, and that of the United States court has commenced.

The language of the court in R. R. Co. *vs.* Koontz, 104 U. S., 14, is: "That when a *sufficient* case for removal is made in the State court the rightful jurisdiction of that court comes to an end, and no further jurisdiction can be had there unless in some form its jurisdiction is restored." In Kern *vs.* Huidekoper, 103 U. S., 490, the court say, following the decision of Ins. Co. *vs.* Dunn, 19 Wall., 214: "If the cause is removable and the statute is complied with, no order of the State court for its removal is necessary to confer jurisdiction on the court of the United States, and no refusal of such an order can prevent that jurisdiction from attaching;" and further they say, that "when the prerequisities for removal have been performed, the paramount law of the land says that the case shall be removed."

In the Removal Causes, 100 U. S., 457, the court say: "The
118 petition filed in this case was sufficient in form; enough appeared on its face to entitle the petitioner to his removal," but in another part of the opinion it also says: "We fully recognize the principle hereto asserted in many cases, that the State court is not required to let go its jurisdictson until a case is made, which upon its face shows that the petition can remove the cause as a matter of right."

These decisions all leave a discretion with the State court, to at least pass upon the sufficiency of the case made by the petition. They do not require that it should surrender its jurisdiction until a petition complying with the provisions of the statute is presented to the court.

And it was expressly held in Ins. Co. *vs.* Pechner, 95 U. S. 185, that "The right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case that comes within the Statute. * * * If he fails in this, he has not,

in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, *the court may proceed until it is judicially informed that its power over the cause is suspended.*"

And in Amory *vs.* Amory, *Ib.*, 187, the court held that "A State court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed, which upon its face shows the right of the petitition to the transfer. It was not error for the court to retain these causes."

Thus we have the direct authority of the highest tribunal which can pass upon the question, to the effect that the State court is not powerless to examine into the grounds of removal so far at least as to pass upon their sufficiency as they appear upon the face of the petition itself.

But it may be said that in the two cases cited, the petition itself did not sufficiently state the citizenship of one of the parties. This may be true, but the cases establish the principle that the State court is not deprived of the exercise of all judgment in the matter, and forced to give up its jurisdiction for the sole reason that a petition for a removal is filed.

It is to be remarked of these cases also that they were brought up by writ of error to the Supreme Court from the State court direct, and not from the U. S. circuit court to revise decisions upon motions to remand.

This furnishes a conclusive answer to the position taken
119, 120 by appellant, and sustained by decisions of some of the circuit courts of the U. S. to the effect that whilst the sufficiency of the application may be questioned it can only be done in the U. S. court, to which the cause is removed upon a motion to remand or upon the trial of the cause therein.

There is such conflict of authority in the circuit courts upon this and all other points raised on the present application for removal, that it is hardly worth while to discuss or review the cases. It is worthy of remark, however, that in our own circuit, Mr. Justice Bradley, of the U. S. Supreme Court, held in the case of Wells *et al.*, *ex parte*, 3 Woods, 128, that when a petition is presented to a State court, under section 641 Revised Statutes, for the removal of a prosecution pending in that court to the Federal court, the State court has a right to examine its sufficiency. His language is: "The State court surely is not bound to shut its eyes and yield to every application that comes to it, though removal (when authorized) is a matter of right, and not of favor; yet the court must have the right to see whether the application to remove comes within the meaning of the law."

We think that, in view of the language of the statute on the subject of removals and of the decisions of the U. S. Supreme Court, there can be no doubt of the power of the State court to pass on the sufficiency of the petition for the removal of this cause.

The remaining question is, did the court below, in passing upon this petition, correctly hold that it was insufficient, and refuse to remove the cause?

The two objections raised to the petition below were, that the com-

pany was not a Federal corporation, and that the appellant's defence under a law of the United States was not set forth. In the view we take of the case, it will not be necessary to consider the first of these objections. Neither will we notice the defect in the petition, caused by a failure of appellant to verify it by oath as to the nature of his defence. The statute in terms requires such an affidavit, but the counsel for plaintiff below did not object on that ground, nor urge the objection in this court.

As to how far the applicant is required to set forth in his petition the defence which he claims to have under a law of the United States, and how far the State court may go in inquiring into the nature of that defence, there is a conflict in the decisions of the U. S. circuit courts.

121 In the New York and Iowa circuits, and perhaps others, it has been held that it was sufficient to state that the corporahad a defence under its charter. In the ninth circuit it has been held that the petition should set forth the defence, or that it should otherwise appear from the record, so that the court could see whether or not such defence existed.

No decision upon the exact point under the 640th section of the Revised Statutes U. S. has been made by the United States, so that we are left to draw our conclusions from the reasoning on each side by the lower courts, and from decisions of the Supreme Court of the Union in analagous cases.

The circuit courts, which have denied the right of the State courts to go further than to inquire into what is disclosed upon the face of the petition, or to hold that it is bad for not setting forth the nature of the defence under a United States law, generally base their opinions upon the want of any authority in the State court to pass upon the sufficiency of the petition in any respect, or upon the ground that the applications upon which they have passed followed the general language of the statute, or that upon a mere motion or objection to an application the merits of the cause could not be examined into.

The first of these positions we have already disposed of. The last is not tenable, because the Supreme Court has in effect passed upon it, endorsing the action of circuit courts in remanding causes, when they have done so upon mere motion based on the insufficiency of the petition.

As to the other ground, it must proceed upon the idea that the petition is not a pleading, and therefore not subject to the rules of pleading, one of which is that it must set forth clearly the grounds on which it is based, leaving nothing to inference, and not stating mere conclusions of law.

That such petition is a pleading, and governed in a great measure by the rules of pleading, is thoroughly established by the decision of the U. S. Supreme Court, in Gold-washing & Water Co. *vs.* Keyes, 96 U. S., 199.

That cause was removed under that part of the act of 1875 which provides for the removal of suits arising under the Constitution and laws of the United States.

The application stated that "the action arises under, and that its determination will necessarily involve and require, the construction of the laws of the U. S.," &c.

122 Chief Justice Marshall had held in Cohens *vs.* Virginia, 6 Wheaton, 379, that a case may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either. So the petition may be said to have come within the letter and spirit of the act, and that no objection could be made, excepting as to the general nature of its allegation, or its failure to show how the construction of such law was involved.

The Supreme Court held that as neither the plaintiff claimed a right under the United States law, nor defendant set up a defence under it, the Court would have to look to the facts set forth in the petition alone to judge of the correctness of the removal.

It held that the petition performed the office of a pleading. Upon its statements, in connection with the other parts of the record, the courts must act in declaring the law upon the question. "It should therefore set forth the essential facts, not otherwise appearing in the cause, which the law has made conditions precedent to the change of jurisdiction. If it fails in this it is defective in substance, and must be treated accordingly. * * * It is the office of pleadings to state facts, not conclusions of law. It is the duty of the courts to declare the conclusions, and of the parties to state the premises."

The court goes on to say: "They (the defendants) state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes. Certainly an answer containing only the statements of the petition would not be sufficient for the presentation of a defence under the provisions of the statutes relied on. * * * In pleading the statute, the facts must be stated which call it into operation. The averment that it is in operation is not enough, for that is the precise question the court is called upon to determine."

The court concludes the subject by saying that "if these facts," *i. e.*, the facts from which the conclusion stated in the petition is derived, "sufficiently appear in the pleadings, the petition for removal need not restate them; but if they do not, the omission must be supplied in some form, either by the petition or otherwise."

It is needless to add arguments to these so well stated in the above opinion. Although upon a different statute, the reasoning applies with equal force to the present case. Neither the plaintiff's

123 nor defendants' pleadings disclosed the fact that the appellant could have had any defence under its corporate acts. We must resort, therefore, to the application alone. It stated the conclusion of law that the appellant had a defence under its charter, a law of the United States, without showing from what facts it drew that conclusion. Looking to that charter, we see no defence to the present case which could possibly arise under it. The application considered as a pleading was defective in stating a conclusion instead of stating the premises, so that the court might draw its own conclusions. And the whole record taken together shows that the

conclusion was improperly drawn from the premises by the applicant.

This case strongly illustrates the incorrectness of the ruling which forbids the State court from determining the question of the right to a removal, and leaves it to be decided by the United States circuit court upon a trial of the merits of the cause. (Fisk *vs.* P. R. R. Co., 6 Blatchford, 362.) The cause was tried below upon every question of law and fact which the counsel for either party wished to present, yet neither in the pleadings, the evidence received or offered, nor in any other portion of the proceedings, was there developed any defence under the laws of Congress granting a charter to the appellant. The defences relied on were such as might have been urged by any corporation or private person acting as a carrier of passengers under the same state of facts.

If the cause had been removed to the circuit court as requested, it would have been tried in the same manner, under the same pleadings, and with the same evidence. There was no defence that the appellant could have interposed there that was not available in the State court. It follows, then, under the rulings above alluded to, that as no such defence as was stated in the application for removal would have been developed, the cause would have been remanded to the State court. Thus all the trouble, expense, and delay incident to a change of jurisdiction would have been incurred, and the cause reached the same point where it was when the removal was applied for.

It certainly could not have been the intention of the law to bring about such a disastrous consequence to suitors in the State courts.

The object of the statute of removal, doubtless, was to have the United States laws construed by the courts of the general
124 Government, and thereby produce not only uniformity of decision, but place the interpretation of such acts where it justly belongs. It certainly was not intended that under the pretext of having a defence by virtue of such law a corporation could carry its causes from the State to the Federal courts, and there have them tried when no such statute entered into the case.

It is urged that a corporation chart[er]ed by act of the General Government has in every case a defence under the statute incorporating it.

If so, the fact that it was thus chartered is all that is necessary to be known to the court in order to entitle it to removal. Why, then, did the statute require the superfluous statement of the additional fact that the corporation had a defence under a United States law? And why did it require such fact to be sworn to, if the court was bound judicially to know it?

These considerations, together with the authorities cited, lead us to the conclusion that the mere statement in an application for removal that the corporation chart[er]ed by United States law has a defence under its act of incorporation is insufficient, when neither the said act nor any of the papers or proceedings in the cause show that such defence exists, or can possibly arise upon the trial, is not

sufficient to entitle the applicant to a removal. The court did not err in refusing the motion to remove the cause to the Federal court.

This cause and that in 96 U. S., above cited, differ from those known as the "Removal Causes," in 100 U. S. There the petition stated a fact, viz., the citizenship of the parties, and not an inference of law, and its allegations in this respect were fully borne out by the pleadings filed in the cause.

As to the other assignments of error, they may be classified as follows:

The objection to overruling the motion for a continuance; objections to the giving and refusal of charges; to the admission or exclusion of evidence; and, lastly, to the sufficiency of the evidence to warrant the verdict.

It has been frequently held by this court that the action of a court in refusing a continuance will not be revised unless a bill of exceptions to the ruling has been reserved. (Morris *vs.* Giles, 40 Tex., 374; Davis *vs.* State, 40 Tex., 478; Jones *vs.* State, *ib.*, 188.)

There was none reserved by the appellant to this action of the court below.

125 It is also universally held that without a statement of facts or bill of exceptions this court will not consider the action of the court below in receiving or rejecting evidence, nor will it pass upon the correctness of the charges given or refused. (Tucker *vs.* Willis, 24 Tex., 247; Garner *vs.* Cutler, 28 Tex., 175; H. & T. C. R. R. Co. *vs.* Knapp, 51 Tex., 569; Barrett *vs.* State, 25 Tex., 605; Cameron *vs.* Thompson, 12 Tex., 247; Smith *vs.* Tucker, 25 Tex., 594; Frost *vs.* Frost, 45 Tex., 325; Keef *vs.* State, 44 Tex., 582.)

An exception to this doctrine is where the charge given, taken in connection with the pleadings and verdict, is so apparently erroneous as to leave no doubt but that the finding of the jury must have been controlled by the improper instructions. (McGaughey *vs.* Bendy, 27 Tex. Rep., 535.)

This court has also decided that it will not take notice of a bill of exceptions filed after the adjournment of the term of court at which the cause to which it pertains was tried, and that they will not consider a statement of facts filed after such adjournment, if an order has not been made and entered of record during the term allowing such statement to be made up, signed, and filed within ten days after the adjournment. (Ross *vs.* McGowan and McGuire *vs.* Newbill, decided at last Galveston term, 1883; Truitt *vs.* Blundell, Tex. Law Reporter, April, 1883, p. 942.)

The term of court at which this cause was tried adjourned July 2, 1881, and the bill of exceptions and statement of facts were filed on the 11th of that month, without any previous order permitting the statement of facts to be filed after adjournment. Such order would have been unavailing as to the bill of exceptions. We cannot, therefore, consider these papers, nor revise the rulings upon the evidence, nor determine whether the latter was sufficient to warrant the verdict. The charges are not glaringly erroneous, considered in reference to the pleading, but, on the contrary, seem to be fair and just, and to announce correct principles of law as applied to them.

Where there is no statement of facts, nor bill of exceptions, this court will presume that everything necessary and proper to be proved under the pleadings of the prevailing party, in order to warrant the verdict, was proved on the trial. (Anding *vs.* Perkins, 29 Tex., 353; Henderson *vs.* Trimble, 174; Johnson *vs.* Blount, 48 Tex., 38; Bond *vs.* Mallow, 17 Tex., 636.)

126 The allegations of the pleadings in the cause, if proven fully, authorized the verdict, and we cannot disturb it.

The objections to the action of the court on the motion to have the appellee examined by physicians cannot be considered, for want of a bill of exceptions. As to its ruling on the plea in abatement, it is sufficient to say that the plea came too late, if the suit in the United States court was commenced before appellant filed its pleas in this cause to the merits; and if afterwards, the grounds set forth in the plea were not sufficient to abate this action.

All points taken by appellant under his fifth or seventh assignment of error might have been disposed of on the ground that these assignments are, under our rules, too general to entitle them to consideration; but they are so obviously defective, for the reasons above assigned, that we have on that account declined to consider them. There is no error in the judgment, and it is affirmed.

A. H. WILLIE, *Chief Justice.*

CLERK'S OFFICE, SUPREME COURT.

I, Chas. S. Morse, clerk of the supreme court of Texas, at Austin, hereby certify that the above and foregoing ten pages contain a true and correct copy of the opinion of this court, delivered by Chief Justice A. H. Willie, in the cause wherein the Texas and Pacific Railway Company were appellants and A. F. McAllister was appellee.

Witness my hand and the seal of said court, at Austin, Texas, this the 20th day of August A. D. 1883.

[SEAL.] CHAS. S. MORSE, *Clerk, &c.*

Endorsed on cover: Texas Sup. Court. No. 994. The Texas and Pacific Railway Company, plaintiff in error, *vs.* A. F. McAllister. Filed 29th September, 1883.

RECEIVED
NOV 19 1884
JAMES H. MCKENNEY
CLERK

115 — N 2

Supreme Court of the United States.

OCTOBER TERM, 1884.

PHILADELPHIA BAR ASSOCIATION

No. 610.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

A. F. McALLISTER.

W. D. DAVIDGE,
Attorney for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS.

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A. H. WILLIE, *Chief Justice.*

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115 — A 2

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THE TEXAS AND PACIFIC RAILWAY COMPANY

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W. D. DAVIDGE,
Attorney for Plaintiff in Error.

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Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 610.

THE TEXAS AND PACIFIC RAILWAY COMPANY

vs.

A. F. McALLISTER.

STATEMENT.

The plaintiff in error, defendant below, was sued for a tort in a court of the State of Texas, the district court of Harrison county, and filed its petition for the renewal of the cause to the circuit court of the United States for that district.

The petition set forth the commencement of the suit; that the defendant was a corporation created by and organized under a law of the United States (set out by its title), and was not a banking corporation, and that it had a defence arising under a law of the United States, to wit, the act of incorporation, but the nature of the defence was not specified in the petition. (R., 6.)

Accompanying the petition and filed at the same time was a bond in conformity with the requirements of S. 639, R. S. U. S., which the petition offered as good and sufficiet surety. (R., 7, 6.)

The record does not show that the petition was sworn to, but the plaintiff filed exceptions which waived, it is submitted, the want of the oath. (R., 8.)

The court overruled the petition and the defendant excepted. (R., 8.) By the same order the court adjudged the bond offered to be sufficient.

The case then proceeded in the State court and resulted in a verdict and judgment for the plaintiff for $8,000 (R., 37), and on appeal to the supreme court of the State this judgment was affirmed. (R., 45.) The defendant then sued out this writ of error. (R., 45.)

ASSIGNMENT OF ERROR.

The supreme court of the State of Texas erred in affirming the judgment of the district court of Harrison county, sustaining the order overruling the petition to remove.

POINTS AND ARGUMENT.

The facts of this case are, except the omission to verify the petition, the same as in the Texas and Pacific Railway *vs.* Lear Kirk and the Texas and Pacific Railway *vs.* Murphy, Nos. 797 and 824 of this term, and the Court is respectfully referred to the briefs of the plaintiff in error in those cases, and also to the brief of the plaintiff in error in the Union Pacific Railway Co. *vs.* Myers, No. 291 of this term.

As to the failure to verify the petition.

The objection is merely to matter of form—that is, it is not to the facts averred, but to the manner in which they are made to appear. If the objection had been taken at the time, the petition might at once have been verified. The exceptions filed are to the facts and matter of form was thereby waived. The first exception, admitting the facts, denies their sufficiency in law. The ruling of the court is obviously upon fact and substance and not form.

Section 640 provides that the petition shall be verified, but the act of 1875 is silent as to verification.

A party may waive any statutory requirement made for his benefit and not jurisdictional.

954, R. S. U. S.

W. D. DAVIDGE,
Attorney for Plaintiff in Error.

117-142

IN THE

SUPREME COURT OF THE UNITED STATES.

THE PACIFIC RAILWAYS REMOVAL CASES.

Reply to Brief of Judge Dillon.

Much stress is laid upon the wording of the charters of the companies. It is argued that they have the right under such charters, in all cases to sue in the United States Circuit Courts. That if the Circuit Courts possess original jurisdiction, it must follow that they can exercise jurisdiction by way of removal under the act of 1875.

It is not necessary to consider whether this consequence follows if the premises are true, for we think we can satisfy the Court that *no original jurisdiction* is conferred upon the Circuit Courts.

The acts of incorporation of the Union Pacific Railway Co., and the Texas & Pacific Railway, are on this point identical. They enable the compa-

nies "to sue and be sued in all courts of law and equity within the United States." It is argued that these words include the Circuit Courts of the United States.

This argument, if true, proves too much, for the words can just as well be construed to embrace the *District Courts* of the United States as the Circuit Courts.

As we pointed out in our brief in the Myers case, similar words contained in the charter of the first Bank of the United States, were held by this Court in *Bank* vs. *Deveaux*, not to confer the privilege of sueing in the Courts of the United States.

Whenever Congress has seen fit to confer jurisdiction upon the courts of the United States, of suits in which Federal corporations are parties, it has always done so in express terms.

Thus the National Bank Act of 1863 provides that associations formed under the Act "may sue and be sued in any court of law or equity as fully as natural persons.

These words were not thought sufficient to confer the jurisdiction, for Congress, by Sec. 59, expressly authorized suits by or against such associations, to be brought in the Courts of the United States. 12 Stat., 668, 681.

So Congress has expressly provided for the jurisdiction of the Circuit Court in certain classes of suits involving the construction of the Pacific Railway Acts. 19 Stat., 112.

If the wording of the charters of the companies enable them to sue in the Circuit Courts, the same right is possessed by the numerous corporations chartered by Congress in this District. Their charters contain either the identical words now relied on, or synonymous expressions.

Most generally, the right is given to "sue and be sued in any Court of law or equity."

2 Stat., 629.
2 Stat., 634.

Sometimes the expression is varied, thus: "May sue and be sued in any court of record and other places whatsoever." 2 Stat., 625.

Frequently the words are precisely the same as those contained in the charters of the Pacific Railways.

"May sue and be sued in any court of record *within the United States.*" 2 Stat., 622.

"May sue and be sued in any court of law or equity in the United States." 11 Stat., 387.

"Sue and be sued in any Court of the United States." 12 Stat., 796.

The language, though varying, possesses the same signification, and was only used for the purpose of conferring upon the corporations the general right to sue.

Congress, in passing these acts of incorporation, legislated as the legislature of the Union and not as the local legislature of the District. *Cohens* vs. *Virginia*, 6 Wheat., 264.

It is urged that the courts below had no right, on motion, to remand, to decide whether the case was one arising under a law of the United States.

We submit that the inquiry can be as well made at that time as at any other, and that it should be made at that time. Why postpone its determination until a trial on the merits, when the court is satisfied that it possesses no jurisdiction?

Such a course would, in no wise aid the speedy administration of justice.

It is maintained that the same principles govern section 640 R. S., and the 2nd section of the act of 1875.

If this is true, then the principles of *Gold Mining Co.* vs. *Keyes*, already cited, dispose of the cases.

It is only alleged in the petitions that the companies were incorporated under the laws of the United States, and that the cases arise under the laws of the United States, or that they have defenses arising under such laws.

How can the Court judge whether these allegations are true, unless the facts are stated consiting the defense? It is said that the mere statement that the companies are incorporated under the laws of the United States, is sufficient to show that the cases arise under those laws. But the act of 1875 says nothing about such corporations. Their right to remove stands upon the precise same footing as the right of removal by patentees, and other parties whose title is derived from the United States.

They must show facts beyond the mere fact that these rights originated in Acts of Congress. They must establish that the cases *arise* under such acts.

THE U. P. R. R. *vs.* KANSAS CITY.

It is maintained that there is a defense to this action arising under the laws of the United States, independent of the fact of the incorporation by Congress.

We submit that no such defense is shown by the record. The general allegation that petitioner has a defense to the action arising under the laws of the United States, is not sufficient. The pretext of a federal question consists in the allegation that the property had been acquired by the Kansas Pacific Railway Co., for depot and other railway purposes by *authority of law*, and that petitioner held such land for said purposes, and was occupying the same in part for such purposes, and was about to appropriate the residue thereof to such use, the increase of business of petitioner making it imperatively necessary that it should be so occupied." (R. 54.)

It is apparent that the only defense the framer of the petition sought to include, in this language, was the fact of the incorporation of the defendant.

No defense is set out arising under the acts. It was not claimed that the law of the State proceeded under, was in conflict with any provisions of the de-

fendant's charter, or that the proceeding itself was in derogation of any of those provisions.

The only fact stated is that defendant was occupying the land as the successor of the Kansas Pacific for railroad purposes, and that the business of the defendant *made it necessary that it should be so occupied.*

It is not denied by the city that the defendant is the owner of the property as stated. There is no question as to this. The statement as to the necessity of the use of the property for railway purposes, is one of fact, and raises no question under the *laws of Congress.*

The variety of Federal questions which are attempted to be raised under the simple recital in the petition, shows the necessity of enforcing the rule in *Gold Mining Co.* vs. *Keyes.* Counsel seek by argument to make questions which are not raised by the record.

In the brief of Mr. Dillon, the question discussed is as to the *power* of the city to condemn the property.

In the statement brought up by the record, and drawn up subsequent to the decision of the court below, it is alleged, as a Federal question, that if the condemnation proceedings are sustained the interest of the United States in the road, as mortgagee, will be lessened. Also, that the grant to the company under the act of Congress will be made less valuable by the condemnation.

Finally, it is said that the act of Missouri having

authorized the company to acquire these grounds, such rights could not be impaired by the proceeding for condemnation under the city charter.

It is said, in Judge Dillon's brief, that should the company not pay the amount assessed against it for improvement, the railroad property might be sold under execution. The same argument might be made as to the right of taxation, which this Court has sustained. If taxes are not paid the State might enforce its lien. In neither case does it necessarily follow that the property would have to be *sold*, there are other modes of enforcing the lien of the State.

The statement is also made that the lien for the improvement is upon the entire depot. This is not so. The lien attaches only to the specific property improved.

What the cause removed consists of, is shown by the motion to remove. This motion was as follows :

"IN THE MATTER OF THE CONDEMNATION OF PRIVATE PROPERTY TAKEN FOR THE WIDENING OF TWELFTH STREET.

The City of Kansas,

vs.

The St. Louis, Kansas City and Chicago R. R. Co., et al.

This day come the Union Pacific Railway Company, *one of the defendants in this cause*, by its